United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

74-1258

BRIEF FOR AMICI CURIAE
ALLEGHENY POWER SYSTEM, INC., et al.

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1258

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

CELANESE CORPORATION, ET AL.,
Intervenors.

On Petition to Review Action of the Administrator of the Environmental Protection Agency

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ISSUES PRESENTED

(1) Does § 509(b)(1)(E) of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA or Act) grant jurisdiction to this court for direct appellate review of effluent limitation guidelines promulgated by the Environmental Protection Agency (EPA) pursuant to § 304(b) of the Act?

(2) Does the FWPCA allow EPA to impose inflexibly uniform, nationwide effluent limitations and to preclude any further particularized application of the substantive statutory standards, case-by-case, such as is contemplated by EPA's challenged "flexibility" provision?

(3) Does the final particularization of effluent limitations contemplated by the Act require more flexibility than is allowed by the challenged EPA provision, which turns on "fundamentally different factors" not fundamentally different facts, and which applies only to the establishment of 1977 effluent limitations?

COUNTERSTATEMENT OF THE CASE

This case arises on a Natural Resources Defense Council (NRDC) petition for review of a series of regulations[1] entitled "Effluent Limitations Guidelines" promulgated by EPA's Administrator pursuant to the Federal Water Pollution Control

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[1] E.g., 40 C.F.R. Part 412, Feedlots Point Source Category, 39 Fed. Reg. 5703 (Feb. 14, 1974).

Act Amendments of 1972.[2] NRDC challenges the validity of an identical provision in each of the regulations[3] which would allow case-by-case adjustment of the 1977 discharge limitations[4] for classes or categories of industrial discharges. The precise nature of, and authority for, the "Effluent Limitations Guidelines" are at issue in this proceeding.

The FWPCA entails a significant new thrust toward water pollution control. The Act calls for increasingly stringent effluent limitations[5] to be imposed in two phases on each discharge of pollutants[6] from every point source[7] in the

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[2]Pub. L. No. 92-500, 86 Stat. 816 et seq., 33 U.S.C. §§ 1251 et seq. (Supp. II, 1972).

[3]E.g., 40 C.F.R. § 412.12, 39 Fed. Reg. 5707 (Feb. 14, 1974).

[4]Discharge limitations provide the basic requirements for control of pollutant discharges under the Act.

[5]An "effluent limitation" is defined as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources . . . ." § 502(11), 33 U.S.C. § 1362(11).

[6]"Discharge of pollutants" is defined as "any addition of any pollutant to navigable waters from any point source . . . [or] to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." § 502(12), 33 U.S.C. § 1362(12). "Pollutant," as defined, covers a wide range of characteristics and substances, including "chemical wastes, biological materials, . . . heat, . . . and industrial, municipal and agricultural waste discharged into water." § 502(6), 33 U.S.C. § 1362(6).

[7]"[A]ny discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged" is a "point source." § 502(14), 33 U.S.C. § 1362(14).

nation. The first phase requires effluent limitations reflecting "best practicable control technology currently available" by July 1, 1977;[8] the second, achievement of "best available technology economically achievable" by July 1, 1983.[9]

The keystones of the FWPCA's regulatory structure are §§ 301(b), 304(b) and 402.[10] Its essential elements are effluent limitations (§ 301(b))[11] established and imposed in

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[8] § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A). The 1977 test is referred to below as "best practicable technology."

[9] § 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A). The 1983 test is referred to below as "best available technology."

[10] 33 U.S.C. §§ 1311(b), 1314(b), 1342. These sections apply to "existing sources," that is, all point sources that are not "new sources." For "new sources" the relevant sections are §§ 306 and 402. A "new source" is "any source, the construction of which is commenced after the publication of proposed regulations prescribing [an applicable] standard of performance" which is thereafter promulgated. § 306(a)(2), 33 U.S.C. § 1316(a)(2). The Administrator is specifically directed in § 306(b) to promulgate regulations "establishing Federal standards of performance for new sources . . . ." 33 U.S.C. § 1316(b). Since new source standards of performance are not at issue in this proceeding, § 306 is discussed only briefly below.

[11] See note 5 supra. In effect, an "effluent limitation" is a maximum limit on the amount of polluting substances which may be discharged. It may be stated in terms of concentration (e.g., milligrams/liter), mass (e.g., pounds/day), or quantity per unit of production (e.g., pounds/ton).

discharge permits (§ 402) on the basis of effluent limitation guidelines (§ 304(b)).[12]

The issues here go to the heart of this regulatory structure. Their resolution will require determination of the relationship between the effluent limitation guidelines called for by § 304(b) and the effluent limitations which must be achieved in order to implement § 301(b). Because these issues are of first impression, their resolution will influence, perhaps govern, the legality, efficiency, and wisdom with which effluent limitations are established as discharge conditions in permits for over 22,000 industrial point sources by December 31, 1974.[13] As will be indicated below, inappropriate limitations would impose staggering costs on the country. Billions of dollars could be wasted, adverse environmental effects incurred, and scarce energy resources unnecessarily consumed.[14]

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[12]The Administrator is directed in § 304(b), 33 U.S.C. § 1314(b), to publish "regulations, providing guidelines for effluent limitations . . . ." (Emphasis added.) Although the term guidelines is not defined in the Act, their elements are specified in detail in § 304(b). These guidelines are to be used in setting effluent limitations. See the discussion infra at 14-21.

[13]A total of 29,937 industrial dischargers have submitted permit applications under the National Pollutant Discharge Elimination System (NPDES) established by the Act. Only 7,703 permits had been issued as of June 30, 1974. 5 Env. Rptr. Current Developments 436-37 (Aug. 2, 1974). Section 402(k) immunizes current discharges with pending permit applications until December 31, 1974. 33 U.S.C. § 1342(k).

[14]See the discussion infra at 47-48.

SUMMARY OF ARGUMENT

The electric utilities comprising the Utility Water Act Group[15] offer this amicus brief for two purposes. First, they believe that none of the parties' positions, outlined below, (1) fully reflects the FWPCA's clear mandate that effluent guidelines and limitations be used in determining the best technology in every case, or (2) facilitates application to over 22,000 industrial point sources of effluent limitations that satisfy § 301(b)'s substantive requirements. Second, the utilities believe that the jurisdictional question at issue can, and should be, resolved independently of the merits: that is, the administrative requirements of §§ 301(b), 304(b) and 402.

NRDC contends that the Act requires that effluent limitations be established directly under § 301(b) by regulations prescribing "nationwide, uniform effluent limitations" inflexibly applied to all point sources within each industrial class and category. Brief for Petitioner at 35-39. NRDC's argument makes

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[15] The members of the Utility Water Act Group are listed in Appendix A to this brief. These utilities are directly interested in this proceeding, since "Effluent Limitations Guidelines" proposed for steam-electric powerplants contain the same "flexibility" provision challenged here by NRDC. 40 C.F.R. § 423.12 (proposed), 39 Fed. Reg. 8305 (Mar. 4, 1974). Moreover, the economic burden which would be imposed on the utility industry by these proposed regulations "represents a significant portion of the cost of all industrial pollution control by 1983." Defendant's Memorandum in Support of Motion for Modification of Order at 8, NRDC v. Train, Civ. No. 1609-73 (D.D.C. filed Aug. 12, 1974), attached here as Appendix B.

pointless the Act's intermediate requirements of effluent limitation guidelines under § 304(b).

Intervening chemical manufacturers' position, on the other hand, is that effluent limitations can be established only case-by-case as permit conditions are set for individual discharges, and that the § 304(b) guidelines are simply to provide a range of effluent reduction values and a set of decisional factors to be taken into account by the permit grantors. The chemists accord these guideline values little prescriptive effect, except as outer-bounds on the permit grantor's decision. Brief for Intervenors at 28-30, 42-45.

EPA's position is unclear. It purports to have published regulations that serve as both § 304(b) guidelines and § 301(b) effluent limitations. Apparently it intends to impose the numerical effluent reduction requirements of these regulations as permit conditions, with only a modicum of flexibility as to the 1977 requirements and none as to the 1983 requirements. NRDC is, of course, dissatisfied that any flexibility exists. And the chemists argue that if EPA's guideline-effluent limitations are meant to be actual limitations, then they are illegal.

The parties' positions on jurisdiction flow from their views on the proper role of § 304(b) guidelines and § 301(b) limitations. The chemists conclude that § 509(b)(1)(E) of the Act permits this court to review EPA's action approving or promulgating limitations, but not guidelines. Because the

chemists believe that EPA may not legally have issued regulations under § 301(b) prescribing effluent limitations, they contest jurisdiction. NRDC agrees that § 509(b) does not provide for review of § 304(b) guidelines, but argues that EPA is at least allowed to promulgate effluent limitations under § 301(b) and has done so. As a result, NRDC believes that this court has jurisdiction to review the regulations in question.

The utilities think that the parties' positions on the relationship between guidelines and limitations overlook congressional purpose in the FWPCA to establish a two-stage process for defining effluent reductions applicable to individual point sources, a process dependent on a proper use of both rulemaking and case-by-case determinations. As the utilities' argument will demonstrate, in the three keystone provisions of the Act -- §§ 301(b), 304(b) and 402 -- Congress carefully established an administrative process in which the 1977 and 1983 standards are to be particularized in two stages: the first affording the full benefits of rulemaking through promulgation of presumptively applicable § 304(b) guidelines, the second involving the equally vital flexibility to "fine-tune" the standards through case-by-case application as effluent limitations are actually set in permits.

Section 304(b) directs the Administrator during the first, and rulemaking, step in that process to publish "regulations, providing guidelines," expressly "[f]or the purpose of adopting

or revising effluent limitations . . . ." During the second, case-by-case step, permit grantors are instructed by § 402 to "prescribe conditions" in discharge permits to ensure compliance with the "applicable requirements" under § 301, as elaborated in the regulations setting out the § 304(b) guidelines.

Through these two steps the substantive standards of § 301(b) are translated into particularized effluent limitations by weighing the numerous factors determinative of the best technology for each point source. The guidelines must elaborate the terse substantive statutory standards, the utilities believe, and may include a single-value numerical limitation for each industrial class, category or subcategory. Subcategorization should occur to the extent feasible. But Congress never intended to shackle EPA to rulemaking alone, in the face of the immense, significant variability among industrial dischargers across the nation and the huge economic, environmental and energy costs involved. Thus, numerical limitations in the guidelines are presumptively applicable, but not absolutely binding. They are to be applied as effluent limitations in permit conditions unless the permit grantor, or any party, can show that, on the facts of the case at hand, some other limitation more appropriately fulfills the Act's applicable substantive mandate.

In short, the permit grantor is to alter the basic garment provided by the Administrator's guidelines only where the Act shows that alterations are necessary to fit the facts of

the case. The one who seeks alteration must show that, measured by the statutory standard, the facts at hand are ill-suited by the guidelines. And it is the Administrator, through his veto authority over permit issuance, who ultimately determines whether the alterations are fitting and appropriately uniform.

Provisions of the FWPCA other than §§ 301(b), 304(b) and 402 -- particularly those reflecting the careful division of responsibility between EPA and the states -- further implement the congressional desire for a two-stage regulatory process. Indicatively, there is no statutory language that authorizes, much less requires, promulgation of rigidly uniform, nationwide effluent limitations.

Like the statutory text, the Act's legislative history indicates Congress' two-stage intent. The Conferees did intend that effluent limitations be as uniform as possible. To ensure that like cases are treated alike, the Administrator is to be as precise as possible in his guidelines and the states as permit-grantors are to act within those guidelines, subject only to any overriding demands of the FWPCA's substantive requirements. As with the statutory language, there is no legislative history authorizing or requiring regulations that impose inflexible effluent limitations.

The policies of concern to the Act's framers are well served by the two-stage administrative process which they

established for its implementation. The speed and generic solutions open to rulemaking can provide rapid, definitive guidance to permit grantors in most cases. The flexibility afforded by case-by-case determinations can provide the fine-tuning essential, in some instances, to the treatment of like cases alike, and to the avoidance of costly errors. Without the fine-tuning mandated by Congress, there could result staggering excess costs -- economic, environmental, and energy-related -- which the legislators were determined to avoid. The enormity of the stakes makes it imperative that errors be avoided. In the electric utility industry, for example, the initial EPA estimates are that its proposed regulations, if imposed without exemptions for thermal discharges, would require capital outlays of $23.2 billion by 1983 -- outlays that could jeopardize the economic viability of an industry already wracked by an acute financial crisis requiring wholesale curtailment of expansion plans for lack of capital.

The FWPCA's two-stage process also provides for moving quickly from an initial elaboration by guidelines of the Act's substantive standards to the final specification of effluent limitations in permits. The technical expertise available to the Administrator, brought to bear in developing the guidelines, provides for informed decisions by the permit grantors. And the resources of the states are available, through participation in approved NPDES programs, to help conduct the case-by-case fine-tuning necessary to ensure applica-

tion of the best technology in more than 22,000 industrial discharge permits that must be issued by the end of this year.

It follows that EPA's challenged "flexibility" provision is permissible under the FWPCA, even if redundant in light of the Act's distinction between guidelines and limitations. It is important that EPA make clear that its regulations are guidelines only, presumptively applicable as outlined above. At a minimum, EPA must promulgate an expanded "flexibility" provision in order to carry out the two-stage statutory process in substance, if not in exact form. As it stands, the provision does not provide, even as to 1977 requirements, the meaningful flexibility required by the Act. It must be expanded to allow case-by-case modification on the basis of different <u>facts</u> as well as different <u>factors</u>.

Turning to jurisdiction, NRDC and the chemists frame the issue so that its decision seems to require resolution of the merits. The utilities emphasize that, even were NRDC to prevail in its jurisdictional-merits claim that EPA may promulgate § 301(b) effluent limitations by regulation, this need not result in findings either that the Agency <u>must</u> so promulgate the limitations, or that they must be inflexibly uniform. The utilities also stress that jurisdiction may be decided on grounds apart from the merits inquiry into whether the Administrator may promulgate § 301(b) limitations by regulation. The merits are the principal focus of this brief, leaving comment on jurisdiction to the end.

ARGUMENT

I. THE FWPCA ESTABLISHED A TWO-STAGE PROCESS FOR DEFINING EFFLUENT LIMITATIONS

The Act directs that its substantive mandates be applied to individual point sources through a judicious mix of general rules and specific determinations. In examining indicia of the two-stage process, attention goes first to the statutory text, in Part A below, "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." United States v. American Trucking Ass'n, 318 U.S. 534, 543 (1940). Consideration of the Act's legislative history in Part B confirms the congressional purpose evident from its text.

Part C, in turn, considers the administrative context in which Congress' purposes are to be realized. This court's duty, of course, is "to render the statutory design effective in terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment . . . ." National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 689 (D.C. Cir. 1973), cert. denied, 42 U.S.L.W. 3485 (U.S. Feb. 26, 1974).

A. The Statutory Text

Examined here are, first, the keystone provisions, §§ 301(b), 304(b) and 402,[16] which shape and support the Act's two-stage

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[16] 33 U.S.C. §§ 1311(b), 1314(b) and 1342.

administrative structure and, second, other textual indicia of that structure.

1. The Keystone Provisions: §§ 301(b), 304(b) and 402

Section 301(b) simply requires achievement of certain standards of effluent control particularized pursuant to other sections of the Act. It does nothing more. It contains no authority for the establishment of rigidly uniform, nationwide effluent limitations.[17]

The language of § 301(b) mandates that by July 1, 1977, there shall be achieved "effluent limitations for point sources . . . which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act"[18] or "any more stringent limitation . . . necessary to meet water

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[17] NRDC has yet to explain why the Act nowhere explicitly permits or directs the Administrator to promulgate "nationwide, uniform effluent limitations." Rather ingeniously, but unsuccessfully, NRDC attempts to conjure such a requirement from the "close relationship" between §§ 301(b) and 304(b). Brief for Petitioner at 32-34. If Congress had intended to establish an administrative scheme entirely dependent upon uniform, nationwide effluent limitations, it would not have left their existence to conjuring. See the discussion infra at 29-30.

[18] § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A) (emphasis added). This specific provision and its analogue for 1983 state the basic substantive requirements for point sources "other than publicly owned treatment works," limiting the requirements' coverage generally to industrial point sources.

quality standards . . . ."[19] By July 1, 1983, there is to be achievement of "effluent limitations . . . which . . . shall require application of the best available technology economically achievable . . . as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act . . . ."[20]

Thus, § 301(b) does nothing more than fix dates for the achievement of effluent controls based on 1977 technology

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[19] § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). This provision, completely ignored by NRDC, is relevant to the issues facing the court for two reasons. First, its existence indicates that the effluent limitations required by § 301(b) must be determined case-by-case, since those based on water quality standards can be determined in virtually no other way. Second, this provision means that there is no basis for NRDC's fear that any flexibility in the particularization of the technology based limitations will leave "enormous and frequently serious discharges" unabated as a result of the "always present plea of polluters for unique (meaning special) treatment." Brief for Petitioner at 25, 30. Regardless of what level of control is mandated by the technological standards, § 301(b)(1)(C) requires, at a minimum, the July 1, 1977 achievement of effluent limitations necessary to meet or implement water quality standards. And EPA's Administrator has the responsibility and authority under § 303(c), 33 U.S.C. § 1313(c), to ensure that water quality standards are sufficiently stringent.

[20] § 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A) (emphasis added). This requirement is complemented by § 302, analogous to § 301(b)(1)(C), which provides for the imposition of any more stringent control measures necessary to achieve interim water quality goals for 1983 "in a specific portion of the navigable waters." 33 U.S.C. § 1312; see § 101(a)(2), 33 U.S.C. § 1251 (a)(2). However, unlike § 301(b)(1)(C), imposition of these more stringent requirements under § 302 is subject to a cost-benefit justification. 33 U.S.C. § 1312(b)(2).

"defined" by the Administrator as "best practicable . . . currently available" and, later, based on 1983 technology "determined in accordance with regulations issued by the Administrator" to be the "best available . . . economically achievable." Section 301(b), in short, provides for these effluent control requirements to be particularized through a process established by other sections of the Act.

That particularization begins, but does not end, with EPA's publication of effluent limitation guidelines pursuant to § 304(b).[21] Section 304(b) directs the Administrator to publish "regulations, providing guidelines" which are expressly "[f]or the purpose of adopting or revising effluent limitations . . . ."[22] This language makes clear that the guidelines

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[21] Though the term "guidelines" is not explicitly defined in the Act, its use throughout the various other sections of the FWPCA indicates that Congress intended guidelines to provide information and guidance for subsequent administrative actions. See §§ 304(c) ("information"), 304(d) ("information"), 304(e) ("information including (1) guidelines"), 304(f) ("guidelines"), 304(g) ("guidelines"), 304(h) ("guidelines"), 304(i) ("information") 318 ("guidelines"), 403(c) ("guidelines"), 404(b) ("guidelines"), 33 U.S.C. §§ 1314(c)-(i), 1328, 1343(c), 1344(b).

[22] Section 304(b) provides, in pertinent part:

> For the purpose of adopting or revising effluent limitations under this Act the Administrator shall . . . publish . . . regulations, providing guidelines for effluent limitations . . . . Such regulations shall
>
> (1)(A) identify . . . the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources . . .; and
>
> (B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources . . . within such categories or classes . . . .
>
> (2)(A) identify . . . the degree of effluent reduction attainable through the application of the best con-

Continued

are meant for use at some subsequent administrative stage to refine and establish the specific effluent limitations "applicable to any point source."[23] Thus, the regulations provide "guidelines for effluent limitations," not guidelines adopting or establishing effluent limitations.

Section 304(b) indicates how the guidelines are to be useful in setting effluent limitations. With respect to each level of technology, § 304(b)'s language mandates that the guideline regulations do two things: (1) "identify . . . the degree of effluent reduction attainable . . . for classes and categories" and (2) "specify factors to be taken into account in determining the control measures and practices . . . applicable to point sources . . . within such categories or classes."[24]

Continued

> trol measures and practices achievable . . . for classes and categories of point sources . . . ; and
>
> (B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 301 of this Act to be applicable to any point source within such categories or classes . . . .

33 U.S.C. § 1314(b) (emphasis added).

[23] Cf. Congress' similar use of "guidelines" in other FWPCA provisions. Compare § 304(b), 33 U.S.C. § 1314(b) with §§ 304(d)-(f), 403(c), 33 U.S.C. §§ 1314(d)-(f), 1343(c).

[24] 33 U.S.C. § 1314(b)(1)(A),(B). Slightly different language is used in § 304(b)(2); that provision calls for "factors to be taken into account in determining the best measures and practices . . . applicable to any point source . . . ." 33 U.S.C. § 1314(b)(2)(B) (emphasis added).

The section, accordingly, calls for guidelines providing both a technological assessment of control technologies and an indication of various factors "to be taken into account" in the determination of the appropriate control measures (and thus effluent limitations) applicable to particular point sources. Since to develop proper guidelines, the Administrator will already have taken these specified factors into account in the "complex balancing analysis" necessary to proper assessment of candidate control technologies,[25] § 304(b) necessarily contemplates a later, more specific consideration of these factors. Such case-by-case analysis is feasibly conducted only by the permit grantor who, informed and guided by the § 304(b) guidelines, sets the applicable effluent limitations in each discharge permit.

The Administrator is to be as precise as possible in his guidelines, given the limitations on data, time and resources available for their formulation.[26] Where sufficient data and information permit, the Administrator may properly incorporate into the guidelines precise numerical limitations on constituents discharged from point sources within classes or categories. Where available data and information permit, moreover, he should establish subcategories to reflect variability among groups of point sources within classes and cate-

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[25]See note 29 infra.

[26]See the discussion infra at 45-47, 49-50.

gories and to refine further the statutory standards.

The ultimate statutory constraint, however is that the effluent limitations applied to each point source reflect the "best"[27]

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[27]The word "best" is common to the 1977 and 1983 substantive requirements. Webster's Third New International Dictionary 208 (1971) gives the term its customary meaning of "most productive of good." Congressional concern that the FWPCA do the country more good than harm (see note 28 infra) makes clear that the legislators' and Webster's understanding of "best" is the same. The "best" technology under the FWPCA is that most productive of social good. As the Circuit Court of Appeals for the District of Columbia said in the context of the Clean Air Act, when construing language calling for the "best system of emission reduction":

> The standard of the "best system" is comprehensive, and we cannot imagine that Congress intended that "best" could apply to a system which did more damage to water than it prevented to air.

Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 385-86 n.42 (D.C. Cir. 1973), cert. denied, ___ U.S. ___ (1974) (emphasis added).

As seen below in note 29, its accompanying text, and the text at note 30, the scope of the factors to be considered under § 304(b), and the manner of their consideration, give further substance to the FWPCA's use of "best." These factors go beyond strictly technological questions such as "process employed" and "engineering aspects," to cover broader matters such as "total cost . . . in relation to benefits" and "non-water quality environmental impact (including energy requirements)" as well as any other "appropriate" matter. The factors, in short, encompass the full range of evidence important to the choice of those effluent limitations that are most productive of social good. In addition, the "specific and detailed consideration" that such factors are to be given and the "complex balancing analysis" required concerning them (see infra note 29) indicate that Congress had in mind far more than a narrow search for the technology most mechanically apt in reducing effluents.

For an emphatic indication that the House expected detailed consideration of these factors, see H. R. Rep. No. 911, 92d Cong., 2d Sess. 107 (1972) (hereinafter cited as House Report), reprinted in Senate Comm. on Pub. Works, 93d Cong., 1st Sess., 1 A Legislative History of the Water Pollution Control Act Amendments of 1972 at 794 (Comm. Print 1973) (hereinafter cited as Legis. Hist.)

technology in that particular case.[28] And the "best" must be determined through a "complex balancing analysis" of numerous

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[28] Congress demanded such "fine-tuning" at the point of application because of its intense concern with the overall social costs to be imposed by this Act. Senator Randolph, Chairman of the Senate Public Works Committee, emphasized the importance of economic considerations in particular:

> The committee does not want to impose impossible goals, nor does it intend to require expenditures so excessive that they would undermine our economy . . . . Senator Bentsen constantly and correctly called our attention to the impact and the cost of these programs, being strongly for them, but recognizing them as part of our total economy.

117 Cong. Rec. S 17404 (daily ed. Nov. 2, 1971), 2 Legis. Hist. 1272.

There were basically three reasons why the Senators were concerned about the social impact of the FWPCA. One was expressed by Senator Bayh, a ranking member of the Subcommittee on Air and Water Pollution, when he explained that the bill from the Conference was designed to avoid "incurring such massive costs that economic chaos would result." 118 Cong. Rec. S 16892 (daily ed. Oct. 4, 1972), 1 Legis. Hist. 216. The second reason, the desire to avoid misallocation of resources, was emphasized by Senator Buckley in his Supplemental Views on S. 2770, the bill which ultimately became the FWPCA:

> The commitment of resources to one sphere of activity means that those resources are no longer available for other competing needs where a given investment can, on balance, do more to move us towards achievement of all of our environmental goals.

S. Rep. No. 414, 92d Cong., 1st Sess. 103 (1971) (hereinafter cited as Senate Report), 2 Legis. Hist. 1518. Finally, the Senators were also wary of a consumer backlash against disproportionate environmental controls. As Senator Bentsen stated:

> If these programs cause too severe economic dislocations, if the economic and social benefits of pollution control programs bear no reasonable relationship to the cost involved in implementing them, then all of our best efforts to clean up the waterways could be defeated in a backlash against those of us who are working to clean up the environment.

117 Cong. Rec. S 17408 (daily ed. Nov. 2, 1971), 2 Legis. Hist. 1281. House members were similarly concerned about costs and recognized that in some cases the cost of pollutant removal "can far exceed any reasonable benefit to be achieved." House Report 73, 103, 119-20, 1 Legis. Hist. 760, 790, 806-07.

economic, technological and environmental factors.[29]

This balancing cannot be wholly accomplished in § 304(b) guidelines. Subcategorization in them cannot realistically account for the tremendous material variability among point sources within categories. Thus, there must be room for adjustment, or "fine-tuning," of any fixed numerical limitations prescribed in the guidelines in those cases in which they are demonstrably inappropriate.

The necessity for fine-tuning is apparent in the nature of the factors which Congress explicitly required to be "taken into account." Rather than merely directing the Administrator to "specify factors," Congress enumerated <u>particular</u> factors as the minimum to be specified and demanded that they be "<u>taken into account</u>." Subparagraphs (1)(B) and (2)(B) of § 304(b)

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[29]Senator Muskie made clear during debate on the Conference Report that the FWPCA imposes balancing requirements like those of the National Environmental Policy Act, 42 U.S.C. §§ 4321-47 (1970) (NEPA):

> [V]irtually every action required of the Administrator will involve some degree of agency discretion -- <u>judgments involving a complex balancing analysis of factors that include economic, technical, and other considerations</u>.
>
> . . . .
>
> . . . <u>The ground rules for this [NEPA] kind of finely-tuned, systematic balancing analysis are explicitly set out repeatedly in the FWPCA</u>.

118 Cong. Rec. S 16878 (daily ed. Oct. 4, 1972) (emphasis added), 1 Legis. Hist. 181-82; <u>accord</u>, 118 Cong. Rec. H 9117 (daily ed. Oct. 4, 1972) (remarks of Representative Jones, House Floor Manager of the Conference Report), 1 Legis. Hist. 232.

each contain Congress' listing of pertinent factors, for example:

> Factors relating to the assessment of best practicable control technology . . . shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits . . ., the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate . . . .[30]

Adequate "consideration" of these factors requires the careful, case-by-case analysis in question. Through this analysis the actual effluent limitations called for by § 301(b)'s substantive requirements are to be shaped, with due regard for the guidelines issued by EPA's Administrator under § 304(b).

Congress' intent that the limitations be set in this manner is reflected in § 301(d) and underscored by comparison of that provision with § 304(b). Pursuant to § 301(d), "best available technology" effluent limitations must be reviewed at least every five years and revised if necessary.[31] This five-year review period corresponds to the five-year permit term set in § 402(b)(1)(B).[32] In contrast, § 304(b) requires annual review, and

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[30] 33 U.S.C. § 1314(b)(1)(B). The quoted language is from § 304(b)(1)(B) relating to "best practicable" guidelines. That of § 304(b)(2)(B) for "best available" guidelines is similar.

[31] 33 U.S.C. § 1311(d). There is no provision, or need, for revising "best practicable," or 1977, limitations since they will be superseded by "best available" requirements in 1983.

[32] 33 U.S.C. § 1342(b)(1)(B). The five-year term applies to EPA-issued permits through § 402(a)(3), 33 U.S.C. § 1342(a)(3).

appropriate revision of the guidelines published pursuant to that section. If, as NRDC would prefer, applicable limitations were to be established by regulation, the annual review (or revision) of § 304(b) guidelines would necessarily entail review (and revision) of the § 301(b) effluent limitations. But had Congress intended such a scheme, there would have been no need for review and revision of effluent limitations every five years.

Consideration of § 402 is necessary to complete examination of the statutory provisions that bear directly on the FWPCA's two-stage administrative process. In the interests of context, textual analysis of § 402 best begins with § 301(a), which proscribes the "discharge of any pollutant"[33] into navigable waters, "[e]xcept as in compliance with this section [301] and sections 302, 306, 307, 318, 402, and 404 of this Act . . . ."[34] Of the exceptions enumerated, the most important is for discharges in compliance with § 402 discharge permits; all the other exceptions, except those for special permits, are encompassed in § 402.[35]

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[33]See note 6 supra.

[34]33 U.S.C. § 1311(a).

[35]The only § 301(a) exemptions not within the sweep of § 402 are provisions for special permits under § 318 (aquaculture projects) and § 404 (disposal of dredged material). See 33 U.S.C. §§ 1328, 1344.

Section 402 establishes the "National Pollutant Discharge Elimination System" (NPDES) under which discharge permits may be issued by individual states with adequate permit programs, or until the state programs are developed, by EPA.[36] Compliance with the terms of an NPDES permit issued pursuant to § 402 is "deemed compliance with sections 301, 302, 306, 307, and 403"[37] for purposes of the enforcement and citizens' suit provisions.[38] The other substantive exceptions enumerated in § 301, accordingly, are swept into § 402. To complete the fabric, § 402 permits are woven back into § 301 by the requirement that all discharge permits "apply" and ensure compliance with, "any applicable requirements of sections 301, 302, 306, 307 and 403 . . . ."[39] For existing point sources,[40] the

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[36] 33 U.S.C. § 1342. Requirements for state permit programs are specified in § 402(b) and in regulations issued by the Administrator pursuant to § 304(h), 33 U.S.C. § 1314(h). See 40 C.F.R. Part 124 (1973). The Administrator has the authority, in effect, to veto any state permit by objecting to its issuance as being outside the guidelines and requirements of the Act. § 402(d)(2), 33 U.S.C. § 1342(d)(2). He may also terminate a state's permit authority, after hearing, by withdrawing his approval of the program. § 402(c)(3), 33 U.S.C. § 1342(c)(3).

[37] Section 403, not among those enumerated in § 301(a), provides for ocean discharge criteria. 33 U.S.C. § 1343.

[38] § 402(b), 33 U.S.C. § 1342(b). See §§ 309 and 505, 33 U.S.C. §§ 1319, 1365, for the federal enforcement and citizens' suit provisions, respectively.

[39] § 402(b)(1)(A), 33 U.S.C. § 1342(b)(1)(A). This requirement is applicable to EPA-issued permits, as are all state program requirements, through § 402(a)(3), 33 U.S.C. § 1342(a)(3).

[40] See note 10 supra.

applicable substantive requirements relevant here are those of § 301(b).

Against this background, Congress in § 402 unmistakably intends that § 301(b) effluent limitations be set in individual discharge permits. Thus, § 402(a)(1) authorizes the Administrator to issue permits "for the discharge of any pollutant . . . upon condition that such discharge will meet" the applicable substantive requirements, including those of § 301(b).[41] Section 402(a)(2) directs him to "prescribe conditions for such permits to assure compliance with [those] requirements . . . ."[42] It is through prescribing conditions for discharge permits that the applicable § 301(b) requirements are finally particularized, heeding § 304(b) factors, and the effluent limitations for individual point sources specifically defined.

In the FWPCA's administrative structure, the permit grantor shares the responsibility with the rule-maker to ensure that the controls actually applied are the "best" for the particular point source. Although any relevant fixed limitations in the guidelines are persuasive, and presumptively applicable, the permit grantor remains free to modify or adjust them in individual cases when the facts before him justify such departure. His exercise of discretion will be guided by the factors specified in the Act, and any added by the guidelines. These factors

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[41] 33 U.S.C. § 1342(a)(1).

[42] 33 U.S.C. § 1342(a)(2) (emphasis added).

indicate the types of considerations which may alter the results in individual cases. Hence, if a party to the permit proceeding shows that the facts of the particular case warrant departure from any guideline numbers, different and more appropriate limitations may be established and imposed.

As noted earlier, NRDC would largely ignore §§ 304(b) and 402, thus truncating the functions of the permit grantor and guidelines. NRDC would have EPA set "uniform, nationwide effluent limitations," attempting by subcategorization within industries to reflect all the material variability among plants, and shunting aside the FWPCA's requirement that its substantive standards be fine-tuned. Permit grantors would be reduced to marionettes, required mechanically to write predetermined effluent limitations into permits, oblivious to any facts indicating that other limitations better realize the Act's substantive requirements. And the § 304(b) guidelines which Congress so carefully described would serve no function at all.

As we have seen, however, §§ 301(b), 304(b) and 402 do not accommodate NRDC's procrustean scheme. These provisions spell out clearly that guidelines, not actual limitations, are to be promulgated by rule and that limitations are to be set case-by-case.

2. Other Textual Indicia

In addition to the keystone provisions, other aspects of the statutory text reflect Congress' two-stage administrative

purpose for the FWPCA. This section looks first to textual indicia of Congress' determination that the states have a major role as permit grantors. Attention then goes to provisions specifically directing the Administrator to establish various national standards, as opposed to guidelines. These provisions underscore the absence of such a command regarding § 301(b)'s effluent limitations. Finally, this section considers §§ 309 and 505, on which NRDC heavily relies to argue that the Act "at least allows" EPA to adopt § 301(b) effluent limitations. Brief for Petitioner at 20, 22-24.

Congress carefully divided FWPCA functions between the Administrator and the states. Section 101(b) declares it the legislators' policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ."[43] And under §§ 402(b) and (c) the Administrator is directed to relinquish NPDES permit authority to each state upon application as soon as it develops an adequate permit program.[44] The Act, in short, contemplates that states will be the permit grantors with primary responsibility for setting effluent limitations in discharge

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[43] 33 U.S.C. § 1251(b).

[44] The state program must be founded on "adequate authority" to issue permits which "apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403 . . . ." § 402(b)(1)(A), 33 U.S.C. § 1342(b)(1)(A). See note 32 supra.

permits.[45] EPA's setting of inflexible effluent limitations by rule would effectively deprive the states of this congressionally mandated responsibility.

While the Act gives states a major role in its permit program, it grants EPA adequate power to review and veto state-issued permits.[46] The Agency's oversight authority was a point of major difference between the Senate and House Conferees.[47] The fact that the congressmen clashed over the scope of EPA's oversight authority and felt some review necessary shows that they expected -- and thus intended -- the states to have a measure of discretion in setting effluent limitations.[48] The legislators

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[45] E.g., House Report 125, 127, 1 Legis. Hist. 812, 814; Senate Report 71, 2 Legis. Hist. 1489. EPA had approved 15 state permit programs as of June 30, 1974. 39 Fed. Reg. 26061 (1974).

[46] EPA's Administrator retains the authority to review and veto state permits, § 402(d)(2), 33 U.S.C. § 1342(d)(2), and to withdraw his approval of a state permit program, thereby ending its NPDES authority, § 402(c)(3), 33 U.S.C. § 1342(c)(3).

[47] The Senate version of the bill had required the Administrator to approve the conditions imposed in any state permit. S. 2770, 92d Cong., 1st Sess. § 402(d)(2) (1971); Senate Report 70, 71, 2 Legis. Hist. 1488, 1489. The House had restricted his veto authority to cases in which another affected state objected to the particular permit. H.R. 11896, 92d Cong., 2d Sess. § 402(d)(2) (1972); House Report 127, 1 Legis. Hist. 814. The Conference agreement added to the House version authority to veto all state-proposed permits found to be "outside the guidelines and requirements of this Act" by objecting within 90 days after EPA's receipt of a proposed state permit. § 402(d)(2)(B), 33 U.S.C. § 1342(d)(2)(B).

[48] In the House, Congressman Podell offered an amendment which would have eliminated that discretion. The amendment was defeated. 118 Cong. Rec. H 2634-35 (daily ed. Mar. 28, 1972) 1 Legis. Hist. 574-76. In commenting on the need for his amendment, Congressman Podell lamented that "there are no [federal] standards but merely guidelines and there is a substantial difference." Id. at 2635, 1 Legis. Hist. 576 (emphasis added).

did not deem the oversight provision functionless. It would be essentially meaningless, however, if the state, as permit grantor, were required simply to rubber stamp predetermined effluent limitations.

The definition of "effluent limitations" in § 502(11) emphasizes both the two-stage process and its federal-state division of responsibility. Section 502(11) defines "effluent limitations" as:

> [A]ny restriction established by a State or the Administrator on quantities, rates, and concentrations of . . . constituents which are discharged from point sources . . . .[49]

It is only through permits issued under an approved NPDES program that states may establish "any restriction . . . on quantities . . . discharged from point sources." Hence, this definition contemplates the ultimate setting of effluent limitations by the permit grantor.[50]

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[49] 33 U.S.C. § 1342(11).

[50] The centrality of the permit grantor is reflected, again, by § 402's emphasis on public participation in permit proceedings and public availability of all permits and permit applications. See §§ 402(a)(1), (b)(3), (j), 33 U.S.C. § 1342(a)(1), (b)(3), (j).

Comparison of §§ 308 and 509 also indicates a clear distinction between case-specific effluent limitations under § 301 and guidelines under § 304(b). Under § 308(a) the Administrator authorized to command dischargers to provide any information reasonably required in "developing or assisting in the development of any effluent limitation . . . ." 33 U.S.C. § 1318(a) (emphasis added). But "for purposes of obtaining information under section 304(b)" -- i.e., developing guidelines -- the Administrator must apply to the United States district courts to subpoena relevant papers, books or documents. § 509(a)(2), 33 U.S.C. § 1369(a)(2).

Congress was explicit when it intended the Administrator to publish guidelines, on the one hand, and specifically applicable standards, on the other. For example, under § 304(f) the Administrator is directed to publish "guidelines for pretreatment of pollutants" discharged into publicly owned treatment works.[51] But in § 307(b) he is explicitly directed to promulgate "pretreatment standards for . . . those pollutants . . . ."[52] Similarly, § 306(b) is equally explicit in requiring the Administrator to promulgate "regulations establishing Federal standards of performance for new sources . . . ."[53]

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[51] 33 U.S.C. § 1314(f) (emphasis added).

[52] 33 U.S.C. § 1317(b) (emphasis added). Emphasizing the distinction between guidelines and standards, the Senate Report noted:

> [T]his authority [to publish pretreatment guidelines] is in addition to the authority of the Administrator to establish pre-treatment [sic] standards directly under Section 307. The [guidelines] authority . . . is intended to generate information to support . . . States in establishing pretreatment requirements . . . . [P]re-treatment standards established under Section 307 would generally be national in scope . . . . [T]he Administrator is instructed to provide assistance in the form of guidelines.

Senate Report 54, 2 Legis. Hist. 1472 (emphasis added).

[53] 33 U.S.C. § 1316(b)(1)(B). See note 10 supra. Standards set by regulations are tenable for new sources, because prospective dischargers -- unlike existing sources -- can select their location and design to satisfy the standards while minimizing the associated environmental, economic and energy costs. In other words, new source regulations have less need to accommodate the extremes of such costs associated with retrofitting to meet inflexible requirements. See, however, discussion at 55-56 infra.

In contrast, nowhere in the Act did Congress authorize, much less direct, the Administrator to promulgate § 301(b) effluent limitations, or standards, by regulation.[54] There is, however, an express congressional mandate in § 304(b) that the Administrator publish guidelines for the purpose of adopting effluent limitations.[55] By the same token, nowhere in the FWPCA did Congress authorize or direct the Administrator to impose uniform, nationwide effluent limitations.

NRDC rests its contrary views on §§ 505(f), 309(a) and 301(e). E.g., Brief for Petitioner at 22-24. But these sections do not avail Petitioner.

NRDC relies on the fact that § 505(f) for purposes of citizen suits refers to an "effluent standard or limitation"[56] as "an effluent limitation or other limitation under section

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[54]Every provision of the FWPCA which does direct the Administrator to prescribe specifically applicable standards also states in detail the necessary procedural steps. See §§ 306(b)(1)(B), 307(a), (b), 33 U.S.C. §§ 1316(b)(1)(B), 1317(a), (b).

[55]That § 304(b) guidelines are all Congress intended is reflected in § 515, 33 U.S.C. § 1374, which requires the Administrator to give a technical advisory committee prior notice of his intent "to publish any proposed regulations required by section 304(b) of this Act, any proposed standard of performance for new sources required by section 306 . . ., or any proposed toxic effluent standard required by section 307 . . . ." In this listing of regulations, absolutely no mention is made of § 301(b).

[56]NRDC misquotes this § 505 phrase as "effluent limitations and standard." Brief for Petitioner at 22.

301 or 302," and as "a permit or condition thereof."[57] But use of these phrases does not mean that the Act intends the setting of effluent limitations via regulation. Rather, § 505(f) ensures the availability of citizen suits as an enforcement mechanism between December 31, 1974, when permit applicants' immunity expires, and July 1, 1977, when § 301(b)'s phase one effluent limitation requirements take effect.[58] During that period, the only limitations enforceable against dischargers will be those imposed in permits as interim steps toward 1977 compliance, that is, steps such as construction schedules.[59]

Section 505(f) also refers separately to permits and their conditions, because every permit includes extensive conditions relating to the monitoring and report of discharges, as well as the substantive conditions imposing effluent limitations.[60]

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[57] NRDC alludes to "the discussion of § 505(f) in the House and Senate Reports," Brief for Petitioner at 23. The House Report's discussion of § 505(f) at 134, 1 Legis. Hist. 821, however, merely paraphrases that provision. The Senate Report's explanation of § 505, at 79-80, 2 Legis. Hist. 1497-98, talks of settling the applicable "effluent control limitation or standard . . . in the administrative procedure leading to the establishment of such effluent control provision." And it points out that in any enforcement proceeding, "there should be a considerable record available . . . resulting from the Federal and State administrative standard-setting procedures." Id. at 80, 1 Legis. Hist. 1498 (emphasis added).

[58] See note 109 infra.

[59] See 40 C.F.R. §§ 124.44, 125.23 (1973).

[60] §§ 308, 402(b)(2), 33 U.S.C. §§ 1318, 1342(b)(2).

Further, most of the phrases within § 505(f) are not mutually exclusive. Congress was redundant in its definition of "effluent standard or limitation" for citizen suit purposes. At a minimum, § 505(f)(2)-(4) and (6) are covered by § 505(f)(1),[61] and it is likely that Congress intended little distinction between "an effluent limitation or other limitation under section 301 or 302" (§ 505(f)(2)) and "a permit or condition thereof" (§ 505(f)(6)).

Nor does § 309(a)(3)'s reference to a "violation of section 301" and to "violation of any permit condition" support NRDC. "[V]iolation of section 301" in § 309(a)(3) means "operating without a required permit" in violation of § 301(a), not infringement of § 301(b)'s substantive requirements. This is clear from the legislative history NRDC cites as explanation: "The distinction between . . . [the] violation of an unlawful discharge and . . . operating without a required permit under section 402," the Senate Report explained, "is intended to cause the Administrator to act expeditiously to issue permits . . . ."[62] Section 309(a)(3) also indicates that it is "permit condition[s] or limitation[s]" which are to implement the substantive requirements of § 301(b).[63]

Section 301(e), finally, sheds no light on how effluent limitations carrying out the mandate of § 301(b) are to be

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[61] Section 505(f)(1) includes "an unlawful act" under § 301(a), encompassing by reference all the FWPCA's substantive requirements. See the discussion in text at notes 34-35, 38-39 supra.

[62] Senate Report 64, 2 Legis. Hist. 1482 (emphasis added).

[63] 33 U.S.C. § 1319(a)(3).

established. Rather it directs that effluent limitations "shall be applied . . . in accordance with the provisions of this Act."[64] As already noted, it is through the two-stage administrative process established by the FWPCA's keystone provisions that effluent limitations are to be applied to point sources.

No basis exists in the statutory text, then, for NRDC's regulatory desires. The Act's language is directly to the contrary. It requires meaningful use of both guidelines and case-by-case limitations in particularizing the FWPCA's substantive demands.

B. The Legislative History

This section reviews, first, the weight of the legislative history -- termed "unhelpful" by NRDC[65] -- that confirms the congressional intent apparent from the face of the Act. The section then examines and tests those fragments of legislative history on which NRDC relies for its assertion that the Act requires regulations setting "uniform, nationwide effluent limitations."

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[64] 33 U.S.C. § 1311(e).

[65] NRDC notes that "[s]ome of the legislative history is unhelpful on this precise point." Brief for Petitioner at 35.

1. The Administrator is to Provide Guidelines for Setting Effluent Limitations

Despite major differences between the House and Senate which prolonged the Conferees' deliberations,[66] both houses agreed that the Administrator was to provide § 304(b) guidelines for the establishment of effluent limitations in individual permits. The Committee Reports in both houses and the Conference Report all reflected this intent. The Senate Report on S. 2770 characterized § 304(b) as requiring that "the Administrator shall . . . publish effluent-limitation guidelines . . . ."[67] The report went on to explain that § 304(b) "requires the Administrator . . . to publish guidelines for setting effluent limitations reflecting the mandate of section 301, which will be imposed as conditions of permits issued under section 402."[68]

Similarly, the Committee Report on the House amendments to S. 2770[69] characterized § 304(b) as requiring "the Administrator . . . to publish . . . regulations for the establishment of

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[66] See, e.g., 118 Cong. Rec. S 16869 (daily ed. Oct. 4, 1972), 1 Legis. Hist. 162.

[67] Senate Report 49, 2 Legis. Hist. 1467 (emphasis added).

[68] Id. 51, 2 Legis. Hist. 1469 (emphasis added).

[69] The House amendments struck out all of the Senate bill after the enacting clause and inserted a substitute text identical to H.R. 11896. H.R. Res. 913, 92d Cong., 2d Sess. (1972), 1 Legis. Hist. 343; 118 Cong. Rec. H 2481 (daily ed. Mar. 27, 1972), 1 Legis. Hist. 350; 118 Cong. Rec. H 2773-74 (daily ed. Mar. 29, 1972), 1 Legis. Hist. 748-51.

effluent limitations,"[70] not regulations establishing effluent limitations. The Conference Report agreed that the Senate and House bills both called for guidelines and, in explaining the final bill, reiterated the Administrator's role under § 304(b) as one of promulgating "regulations providing guidelines for effluent limitations,"[71] not regulations providing or establishing effluent limitations.

2. Effluent Limitations Are to be Set Case-by-Case by the Permit Grantor

The legislative history is replete with indications that the effluent limitations are to be determined case-by-case in the permit process. The intent was evidenced by all three reports.

The Senate Report called explicitly for case-by-case consideration of the § 304(b)(1)(B) and § 304(b)(2)(B) factors in establishing effluent limitations: "In applying effluent limitations to any individual plant, the [§ 304(b)] factors cited above should be applied to that specific plant."[72] And in explaining § 301, the Senate Report made clear that the mechanism for case-by-case consideration of the factors was to be the establishment of effluent limitations in § 402 permits: "The program [of effluent limitations] proposed by this Section

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[70] House Report 107, 1 Legis. Hist. 794 (emphasis added).

[71] S. Rep. No. 1236, 92d Cong., 2d Sess. 124-25 (1972) (hereinafter cited as Conference Report), 1 Legis. Hist. 307-8 (emphasis added).

[72] Senate Report 50, 2 Legis. Hist. 1468 (emphasis added).

[301] will be implemented through permits issued in section 402."[73] The Senate Report went on to note that:

> [T]he most effective control mechanism for point sources of discharge is one which will provide for the establishment of conditions of effluent control for each source of discharge. A permit or equivalent program, properly implemented and fully utilizing the resources of the State and Federal Government should provide for the most expeditious water pollution elimination program.
>
> The information on the technology of control developed under section 304 should facilitate the administration of this system.[74]

Thus, the Senate Report clearly contemplated the case-by-case establishment of effluent limitations in permits on the basis of § 304(b) guidelines.

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[73] Id. 42, 2 Legis. Hist. 1460. For further evidence of this intent, see the Senate Report's comment on § 301, id. at 44, 2 Legis. Hist. 1462. After noting that "little has been done to identify for industry the exact meaning, on a plant-by-plant basis, of the equivalent of secondary treatment," (a phrase used in the Senate to describe the requirements of "best practicable technology") the Report continues:

> Through the permit program established under section 402, with the help of those States which have effective [permit] programs, the Administrator and the States can and should, by mid-1973, be able to apply specific effluent limitations for each industrial source.

Id. 1462 (emphasis added). Since § 304(b) regulations providing effluent limitation guidelines would have been published in late 1972, S. 2770, 92d Cong., 1st Sess. § 304(b) (1971), obviously the Senators contemplated that the applicable "specific effluent limitations" would be established case-by-case in permits, and thus would not be known until mid-1973.

[74] Senate Report 72, 2 Legis. Hist. 1490 (emphasis added).

A similar intent was reflected in the House Report. It stated that § 301(b) establishes a "basis for the determination of effluent limitations for any discharge of pollutants . . . ."[75] Further indicating a case-by-case determination, the Report referred to "best available" technology as "those processes or control techniques which are the best for a specific point source."[76] And as the Report indicated, the "best" processes or control techniques are to be determined by taking the § 304(b) factors into account for "any point source within a category and class."[77]

The structure reflected in both the Senate and the House bills was not changed by the Conference agreement. With respect to § 304(b)(1)(B) (i.e., "best practicable technology" or 1977) guidelines, the Conference Report explained "[T]he Administrator's regulations providing guidelines for effluent limitations shall specify factors to be taken into account in determining the control measures and practices to be applicable to point sources . . . within categories or classes."[78] Like the Committee reports, the Conference Report specified that the Act requires "regulations providing guidelines for effluent limitations," not regulations providing or setting effluent limita-

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[75]House Report 100, 1 Legis. Hist. 787.

[76]Id. 103, 1 Legis. Hist. 790 (emphasis added).

[77]Id. 107, 1 Legis. Hist. 794 (emphasis added).

[78]Conference Report 125, 1 Legis. Hist. 308 (emphasis added).

tions. And the guidelines are to "specify factors to be taken into account" in deciding what control measures and practices (and therefore effluent limitations) are applicable to "point sources."

The Conference Report repeated this intent for "best available technology" or 1983 guidelines:

> Section 304(b)(2)(B) would require that the guideline regulations specify factors to be taken into account in determining the best measures and practices . . . applicable to any point source . . . within categories or classes.[79]

Thus the Conference agreement reaffirmed the legislative intent apparent in the Committee reports that effluent limitations are to be established case-by-case in discharge permits on the basis of § 304(b) guidelines provided by the Administrator.

3. Legislative History on Which NRDC Relies

As we have seen, the FWPCA's statutory text does not call for the Administrator to impose effluent limitations by regulation. Nor does it demand uniform, nationwide limitations inflexibly applied to all dischargers within an industrial class or category. NRDC's contrary view depends largely on selected fragments from the legislative history. Those fragments are usefully examined. Since an understanding of NRDC's excerpts from the legislative history is enhanced by appreciation of the role of § 301(c) in the FWPCA, that provision is discussed here. Finally, it is helpful as well to focus briefly

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[79] Id. (emphasis added).

on Congress' intent as regards uniform limitations.

To support its position, NRDC seizes on a passage from the Conference Report and on the text of a prepared statement submitted for the record by Senator Muskie. As indicated below, however, these bits of legislative history are inadequate to support an argument that runs counter to the weight of the history and that is squarely at odds with the statutory text.

The pertinent passage from the Conference Report stated that:

> [T]he Administrator or the State, as the case may be, will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant-by-plant determination. However, after July 1, 1977, the owner or operator of a plant may seek relief from the requirement to achieve effluent limitations based on best available technology economically achievable.[80]

The first notable aspect of this statement is its reference to a state's "determination of the economic impact of an effluent limitation." Clearly, this is a reference to the state's role in the permit program,[81] which NRDC largely ignores. Under NRDC's scheme states would never be in a position to determine the "economic impact of an effluent limitation." They would be required simply to write into permits the prescribed uniform effluent limitations.

The second important facet of this passage is what appears to be a paradox: How can permit grantors (whether states or the

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[80] Conference Report 121, 1 Legis. Hist. 304 (emphasis added).

[81] 33 U.S.C. § 1342(b). See the discussion at 26-28 supra.

Administrator) make the economic impact determination "on the basis of classes and categories of point sources, as distinguished from a plant-by-plant determination," when setting individual permit limitations? This seeming paradox is explained by a statement of Representative Jones.

Representative Jones, House Floor Manager of the Conference agreement, explained that such an assessment of economic impact would be conducted by taking into account

> the total impact of the action on plants within a given category (e.g., steel, chemical, paper) considering overall financial ability to comply and the national impact of compliance on communities and workers.[82]

Thus, it is the scope of the economic analysis, and not the stage at which it is to be conducted, on which the Conferees were focusing. They directed that the assessment of economic impact, whether at the guidelines stage or the permit stage, include those effects germane to the entire industry's "overall financial ability to comply" and that permit grantors pay special attention to secondary economic impacts when actually setting effluent limitations. Representative Jones gave special emphasis to consideration of "external costs such as potential unemployment, dislocation, and rural area economic development sustained by the community, area, or region" in setting "best practicable technology" limitations.[83]

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[82] 118 Cong. Rec. H 9119 (daily ed. Oct. 4, 1972), 1 Legis. Hist. 237-38 (emphasis added).

[83] Id. at H 9117, 1 Legis. Hist. 231.

The rest of the passage quoted from the Conference Report discusses relief provided by § 301(c) from "best available technology."[84] That section, operative only after July 1, 1977, waives 1983 effluent limitations on grounds of economic hardship to a particular point source. Because the 1983 requirements are more stringent than the 1977, Congress was especially concerned that they might unduly burden individual plants. The requirements, of course, would be set so as to be "best" in light of all relevant factors, particularly such broad-gauged economic impacts as are discussed above. Yet effluent limitations found "best" in that sense, even after a case-by-case fine-tuning, might still be beyond the "economic capability" of the discharger. The legislators, therefore, framed a special waiver for these requirements, permitting the adoption of other, less restrictive standards that are within the "economic capability" of the facility's owner. In other words, § 301(c), like the Conference Report language quoted above, supplements, and is in accord with, the statutory requirement for two-stage particularization of § 301(b)'s substantive requirements.

In arguing that all "variability within a category . . . [must] be taken into account in . . . rulemaking," NRDC "attaches a great deal of importance" to a statement by Senator Muskie. Brief for Petitioner at 36. His

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[84] 33 U.S.C. § 1311(c).

indication that § 304(b) factors "not be considered at the time of the application of an effluent limitation to an individual point source," of course, does lend some support to NRDC. But this assertion is flatly inconsistent with the language of the Act and the language of all the Committee reports, as evidenced by prior discussion. The Senate Report, in particular, states that "[i]n applying effluent limitations to any individual plant, the [§ 304(b)] factors cited above should be applied to that specific plant."[85]

Senator Muskie's remark is also flatly inconsistent with his own prior comments. Those prior statements indicate that the effluent limitations under both § 301(b)(1) and § 301(b)(2)(A) are to be established in permits under § 402. During Senate debate on S. 2770 the following colloquy occurred:

> Mr. Mathais. Does section 301(b)(2)(A) on page 76 [of S. 2770] contemplate that a state, or the Administrator if appropriate might be able to set the 1981 effluent limitations almost on an individual point source by point source basis?
>
> Mr. Muskie. Section 301(b)(2)(A) as well as section 301(b)(1) anticipate individual application of controls on point sources through the procedures under the permit program established under section 402.
>
> . . . .
>
> The information under section 304(b) is to be applied in setting effluent limitations.[86]

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[85] Senate Report 50, 2 Legis. Hist. 1468 (emphasis added).

[86] 117 Cong. Rec. S 17454 (daily ed. Nov. 2, 1971), 2 Legis. Hist. 1391 (emphasis added).

Muskie's response to Mathias shows that effluent limitations are to be set case-by-case in permits and that the § 304(b) factors are to be applied in the process.

To the extent that Senator Muskie's "prepared statement" is inconsistent with the FWPCA as enacted and with the Conference Report it must be ignored. Any such prepared statement represents, of course, only the views of its maker.[87] Significantly, in submitting this same statement for the record, Senator Muskie emphasized the legislators' resolve "not to leave the final evaluation of the bill to legislative history, but instead to write into law as clearly as possible the intent of the Congress."[88]

Significantly, Muskie's prepared statement drew the following rejoinder from Senator Jackson:

> A back-door attempt at legislation through last minute speeches on the floor of the Senate is not the proper conduct of the Nation's business. Fortunately, as . . . court decisions have indicated, the courts will not abide . . . speeches re-interpreting clear legislative language.[89]

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[87] In analogous circumstances at the passage of the National Environmental Policy Act, 42 U.S.C. §§ 4321-47 (1970). Senator Gordon Allott, one of the Senate conferees, specifically noted that a similar ex post facto prepared statement by Senator Muskie did not reflect the intent of the Senate. He pointed out that the Senate members of a Conference Committee do not state the reasons for their actions in a Conference Committee and that the Senate would vote on the language of the Conference Report and not on the interpretations of it given by individual Senators. The other Senate conferees, he said, had not "reviewed, agreed upon, and signed" Senator Muskie's explanatory statements. 115 Cong. Rec. S 40422 (daily ed. Dec. 20, 1969).

[88] 118 Cong. Rec. S 16870 (daily ed. Oct. 4, 1972), 1 Legis. Hist. 164.

[89] Id. 16888, 1 Legis. Hist. 204.

In the House, Congressman Dingell condemned such efforts in both houses to make "so-called bootstrap legislative history."[90] If such tactics were to succeed, any legislator's interpretation submitted for the record could have the effect of binding the entire Congress.

Finally, it is useful to deal briefly with Congress' intent concerning uniform limitations. The Conferees sought reasonable uniformity of regulation in order to "assure that similar point sources with similar characteristics . . . will meet similar effluent limitations."[91] They indicated, however, that this like treatment of like cases was to be sought by the Administrator's providing guidelines which they "expected to be precise."[92] Congress, however, recognized the impossibility of achieving the absolute precision which would be required to prescribe absolutely uniform effluent limitations. The legislators intended that account be taken of differences and required, not that effluent limitations be nationally uniform, but only that "effluent limitations applicable to individual point sources within a given category or class be as uniform as possible."[93]

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[90] 118 Cong. Rec. H 10271 (daily ed. Oct. 18, 1972), 1 Legis. Hist. 107.

[91] Conference Report 126, 1 Legis. Hist. 309 (emphasis added). Congress was motivated in large part by a desire to discourage states participating in the Act's administration from competing for industrial or economic development by adopting lenient limitations.

[92] Id.

[93] Id. (emphasis added).

This is the result achieved when, given guidelines which are as precise as possible, the permit grantor, heeding the § 304(b) factors, adapts them as necessary to respond to the statutory mandate for best technology in light of the facts of the case before him. States as permit grantors are to be kept within the bounds of uniformity, of course, by EPA's oversight authority, described above.[94] Thus, Congress deemed it neither necessary nor desirable to authorize the promulgation of inflexible, national effluent limitations in order to achieve the necessary uniformity.

C. The Administrative Context

This section considers the practical problems of applying § 301(b)'s substantive requirements to individual point sources. Of note, first, is the scope of the administrative task facing EPA (and as delegation occurs, the states) in regulating industrial sources alone under the Act. Involved here are 68 major classes and categories of some 30,000 industrial point sources.[95] The number of discrete subcategories which EPA has

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[94]See notes 46-48 supra and accompanying text.

[95]The Act in § 306(b) listed 27 industrial categories which the Administrator was expected to "concentrate on, but not be limited to" in developing effluent limitation guidelines under § 304(b). House Report 107, 1 Legis. Hist. 794. But a United States District Court found that the Act requires "comprehensive section 304(b)(1)(A) guidelines" covering all industrial categories. Accordingly, by Order of November 27, 1974, the list was expanded from the 27 industrial categories of § 306(b) to include 68 categories which the court found "necessary to provide comprehensive coverage of all point source discharges." NRDC v. Train, Civ. No. 1609-73

Continued

established, and which do not purport to account for all variability, is staggering. For example, guidelines for the 9 industrial categories which are at issue in this case involve 35 subcategories.[96] The 30 major classes and categories which EPA has designated as "Group I, Phase I" industries include 203 subcategories.[97] And since EPA must simultaneously develop "best practicable" and "best available" guidelines for each subcategory, these 30 Group I, Phase I classes and categories require development of 406 separate guidelines. And there are another 38 major classes and categories, which will include an unknown number of subcategories.

Developing effluent guidelines for each subcategory requires detailed, extensive study of waste stream characteristics and treatment capabilities typical in that subcategory, as well as full technical and economic analyses to provide the technical and economic bases for the regulations.[98] In this regard, the

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Continued

(D.D.C. Nov. 27, 1973) (Green, J.), appeal docketed, No. 74-1433, D.C. Cir., Apr. 18, 1974. A list of the major classes and categories for which EPA must prepare guidelines under the Order in NRDC v. Train is attached as Appendix C to this brief. Thus far, 29,937 permit applications have been filed. See note 13 supra.

[96] Appendix for Petitioner at 13, 17-90.

[97] See Appendix C to this brief. In some industries the number of subcategories is extensive. The inorganic chemicals category, for example, is comprised of 22 subcategories.

[98] This difficult, time-consuming process is described in a recent EPA motion in NRDC v. Train, supra note 95, included here as Appendix C.

§ 304(b) factors provide a host of relevant grounds for distinguishing among plants.[99] The material differences among facilities in many of the existing subcategories effectively preclude development of appropriate "nationwide, uniform effluent limitations" for the present subcategories, or definition of a sufficient number of refined subcategories.

Of note, second, is the magnitude of potential error. Inflexible limitations based on hasty analysis could prove enormously costly. Inappropriate limitations, mechanically and universally applied to all plants in a subcategory, could result in wasteful expenditures of literally billions of dollars, adverse environmental effects, and unnecessary consumption of scarce energy resources.[100]

For example, EPA has estimated that the guidelines proposed for steam-electric powerplants could require capital outlays of $23.2 billion by 1983.[101] The impact of such expenditures

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[99] See note 30 supra and accompanying text.

[100] These ills are among those Congress sought to avoid by specifying them for special consideration in § 304(b), 33 U.S.C. § 1314(b).

[101] U.S. Environmental Protection Agency, Economic Analysis of Proposed Effluent Guidelines - Steam Electric Power Plants, II-58 (Mar. 1974). Because of errors in EPA's analysis, it appears to have underestimated the costs by $25 billion. Comments on the proposed regulations by the Utility Water Act Group contain detailed calculations which show that the total capital cost to the industry could be $48.1 billion by 1983. Utility Water Act Group, et al., Comments on EPA's Proposed § 304 Guidelines and § 306 Standards of Performance for Steam Electric Powerplants, Attachment VI, Table XI (1974) (hereinafter cited as Utility Comments).

on the national economy and on the availability of resources for other national priorities would be significant. This $23.2 billion, for example, represents almost one-fourth of the total United States business expenditures for new plants and equipment in 1973.[102] Application of EPA's proposed "best practicable" and "best available" technology for thermal discharges would put 400 to 1,000 pounds of salts into the air each day at a single 1,000 megawatt nuclear generating unit.[103] Meeting the proposed powerplant guidelines would also require burning extra fuel equal to 32.2 tons of coal in 1983 alone -- enough fuel to meet New York City's electricity needs for 2.3 years.[104]

Congress was aware that the costs of control, though uncertain, would be enormous. Thus it required a careful weighing of economic, environmental and energy costs both as the guidelines are formulated and as the limitations are set.[105]

EPA's analyses have been conducted necessarily in the aggregate, looking to typical plants and national-scale problems posed by selected technologies. State or regional

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[102] Id. at VI-4.

[103] U.S. Environmental Protection Agency, Development Document for Proposed Effluent Limitations Guidelines and New Source Performance Standards for the Steam Electric Power Generating Point Source Category 418-19 (Draft, Mar. 1974).

[104] Utility Comments at VI-5 to VI-6.

[105] § 304(b), 33 U.S.C. § 1314(b).

disparities have been largely ignored.[106] Optimal use of resources and avoidance of gross errors, accordingly, require that permit grantors have the flexibility to depart from guideline numbers to the extent that the facts of a particular case warrant such a departure.[107] Otherwise, predetermined effluent limitations or control technologies may be imposed in circumstances that make them infeasible or environmentally counterproductive.

Of note, third, are the tight statutory deadlines imposed by Congress. The legislators provided only one year for the development and publication of effluent guidelines.[108] And they then required that permits establishing effluent limitations be issued by December 31, 1974.[109] Even if the task were thought

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[106] An example is the water consumptive impact of evaporative cooling towers. EPA's finding that no "national water debt" would result since "evaporated water would precipitate through the national water cycle," 39 Fed. Reg. 8303 (Mar. 4, 1974), brought understandably anguished cries from Water Resource Commissions of arid western states.

[107] If, for example, engineering aspects of the control or treatment technology on which the guidelines were based are incompatible with a plant's processes, the permit grantor must modify the effluent limitations applicable to the plant. Similarly, a particular treatment method may be ineffective or counterproductive in an inhospitable climate.

[108] § 304(b), 33 U.S.C. § 1314(b).

[109] § 402(k), 33 U.S.C. § 1342(k). This subsection provides, in effect, a moratorium until December 31, 1974, on enforcement action and citizen suits against discharges without a permit.

possible given unlimited time, EPA could not possibly have defined the subcategories necessary to account for all plant variability within the single year allotted to guideline development. In light of the single year for their development, the guidelines' particularization of the Act's standards is obviously to be for relatively gross groupings. Publishing the guidelines within even the two-year schedule established in NRDC v. Train[110] wholly precludes the detailed subcategorization NRDC envisages.

Faced with the task of designing "a detailed, comprehensive, effective"[111] regulatory program to carry out its water pollution control objectives quickly and efficiently, Congress chose a careful mix of general rules and case-by-case determinations, involving a partnership between federal and state governments. The FWPCA's two-stage administrative process enjoys the advantages of rulemaking without sacrificing the precision required to satisfy the Act's mandate that the best controls be applied in each case.

The promulgation of guidelines ensures technologically-informed decisions by the permit grantor and indicates attainable levels of effluent reduction. In the development of

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[110] The court's November 27, 1973 Order establishing a schedule for publication of guidelines was modified by Orders of January 30, March 14 and 15, and April 18, 1974. The Agency moved on August 12, 1974, for further modification of the schedule. See Appendix C.

[111] 118 Cong. Rec. H 9119 (daily ed. Oct. 4, 1972), 1 Legis. Hist. 235.

the guidelines, characteristics common to plants in a subcategory can be analyzed through the gathering of generic information and the treatment of generic issues. The technical expertise available to the Agency can be brought to bear on these matters to resolve common issues and provide technical aid otherwise unavailable to the permit grantor. If available information is sufficient, the guidelines may contain numerical limitations developed by balancing the § 304(b) factors, and which are presumptively applicable.

Aided by the guidelines, the permit grantor brings to bear his greater familiarity with local conditions in analyzing the facts of each case to determine whether they affect the balance struck in the guidelines. If so, he then makes any adjustments necessary to ensure that § 301(b)'s substantive requirements are met by effluent limitations applied in the particular case.

Like the interplay between guidelines and limitations, the federal-state partnership reflects congressional desire for efficient use of administrative resources in implementing the Act. Congress consciously selected an administrative regime which would fully utilize available resources of the federal government and over fifty state agencies[112] in the herculean task of establishing appropriate limitations for all industrial

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[112]See § 502(3), 33 U.S.C. § 1362(3).

point sources within the Act's stringent deadlines.

Against this background, NRDC's call for "national uniformity" is critically defective because it shackles EPA to rulemaking alone. It denies to the FWPCA's administrators the benefits of any case-by-case particularization of the statutory standards, wasting the administrative resources and skills built up in the fifty states, contrary to the intent of Congress. All variability among plants would have to be accounted for by rules setting inflexible effluent limitations, reducing the states to mechanical application of given numbers without regard to the facts at hand. Unique or novel circumstances encountered in the Act's administration would necessitate EPA's promulgating revised regulations, at great cost to the faithful, speedy implementation of the Act's substantive requirements.[113] Denying EPA the flexibility to make case-by-case adjustments would impede the Act's administration just as effectively as would denying the Agency the power to make substantive rules.

While Congress never intended to shackle EPA to rulemaking in implementing the FWPCA, the Act does, of course, grant the Administrator general authority "to prescribe such regulations as are necessary to carry out his functions under this Act."[114] Some courts have liberally construed such broad

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[113] Already EPA has had to propose or publish regulations revising 12 of the 27 guideline regulations it has published. Understandably, this process has impeded the development of guidelines for additional industries. Defendant's Memorandum in Support of Motion for Modification of Order at 5, NRDC v. Train, supra note 95.

[114] § 501(a), 33 U.S.C. § 1361(a).

grants of rulemaking authority in order to provide agencies the flexibility of elaborating substantive standards through rulemaking, as well as by case-by-case determinations. E.g., National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), cert. denied, 42 U.S.L.W. 3485 (U.S. Feb. 26, 1974).

The question here, however, is not whether EPA has the authority to elaborate the Act's substantive standards through rulemaking. Clearly it does. Rather the question is how EPA may use the rulemaking power it enjoys. The Act's language and legislative history show that Congress created a two-stage administrative process to ensure application of the best controls in each case. The Agency's method of proceeding "'must conform with the terms, policies and purposes of the Act.'" National Petroleum Refiners Ass'n, 482 F.2d at 680, quoting Public Service Comm'n of New York v. FPC, 327 F.2d 893, 897 (D.C. Cir. 1964). The test of the propriety of rulemaking is whether it implements the statutory plan. Cf. National Petroleum Refiners Ass'n, 482 F.2d at 678. Any exercise by EPA of general rulemaking authority to establish inflexible "uniform, nationwide effluent limitations" would be inconsistent with the FWPCA's statutory plan.

II. THE FWPCA REQUIRES MORE CASE-BY-CASE FLEXIBILITY THAN EPA'S CHALLENGED PROVISION AFFORDS

EPA's regulations purport to contain "effluent limitations

guidelines" as required by § 304(b),[115] but they appear to set effluent limitations, mandating "no discharge" or a fixed numerical limit.[116]

As Part I above shows, EPA should have published effluent guidelines with presumptive effect, not inflexibly binding effluent limitations. Thus, this court should direct the Agency to clarify the status of its regulations and to state clearly that they are guidelines only, with presumptive effect of the type outlined above at 17-21, 24-25. Once EPA so provides, there will be no pressing need for a separate flexibility provision, such as the Agency has adopted.

The flexibility contemplated by the challenged provision, however, is not only permissible under the Act, but required by it. Promulgation by EPA of such a provision, even if redundant, is clearly valid.

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[115] E.g., 39 Fed. Reg. 6590 (Feb. 20, 1974), Appendix for Petitioner at A-40: "The purpose of this notice is to establish final effluent limitations guidelines . . . ." In addition, the regulations are entitled "Effluent limitations guidelines." 40 C.F.R. § 411.12, id. at 6592, Appendix for Petitioner at A-42 (emphasis added).

[116] Section 411.12 states, for example, that "[t]he following limitations establish the quantity or quality of pollutants or pollutant properties . . . which may be discharged by a point source subject to [these] provisions . . . ." Id. at 6592, Appendix for Petitioner at A-42. In addition, the limitations themselves are phrased in absolute terms.

Indeed, even if the Act did authorize promulgation of effluent limitations by regulations issued under § 301(b), which it does not, some provision for adjusting or modifying these requirements would still be required where their application ran counter to the standards of the FWPCA. The Administrator's authority to elaborate the standard of best technology for a range of situations by general rule does not relieve him of the obligation to determine what is best in particular cases. See WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969). The court in WAIT thus articulated the principle:

> The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances. 117

In upholding exercise of the Federal Trade Commission's general rulemaking authority to promulgate substantive rules, Judge Wright emphasized in National Petroleum Refiners that the Commission's administration of those rules must afford those regulated

> some opportunity . . . to demonstrate that the special circumstances of his case warrant waiving the rule's applicability, as where the rationale of the rule does not . . . apply to his own situation 118

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117 418 F.2d at 1157 (citations omitted). The court in WAIT further stated that "provision for waiver may have a pivotal importance in sustaining the system of administration by general rule." Id. at 1158.

118 482 F.2d at 692.

The need for such provisions arises from an agency's obligation to heed statutory standards in individual cases notwithstanding general rules thought to fulfill the statute's mandate in most cases. Proper implementation of a flexibility clause can "ameliorate the rigors of mechanical application of the rules in appropriate cases without making the application of the rules unduly complex for the agency." Gulf Oil Corporation v. Hickel, 435 F.2d 440, 447 (D.C. Cir. 1970). Thus, the court in WAIT found the "combination of a general rule and limitations [on its applicability] is the very stuff of the rule of the law" and expressed its belief that through such a combination,

> with diligent effort and attention to essentials administrative agencies may maintain the fundamentals of principled regulation without sacrifice of administrative flexibility and feasibility.

418 F.2d at 1159. It follows that the challenged EPA provision could not be faulted for excessive flexibility.

The real and substantial infirmity of the provision is, rather, its inflexibility. It applies only to cases in which "fundamentally different factors" occur, not also to cases in which the facts (but not the factors) are sufficiently different to warrant modified numerical limitations.

If the Administrator is thorough in his guidelines analysis, he will not overlook pertinent factors, and the permit grantor will always be reexamining factors already reviewed by the Administrator. Thus, there will be few if any situations involving "fundamentally different factors." But there will

be many instances involving fundamentally different values of the same factors. These differing values affect the balance, and the permit grantor must be sensitive to them.[119] As presently worded, EPA's flexibility clause denies him the flexibility required by the FWPCA and cases such as WAIT.

EPA's flexibility provision is also applicable now only to the setting of 1977 effluent limitations. Yet all of the statutory language and legislative history discussed above speak equally to the 1983 framework. Since a similar degree of flexibility will be necessary in determining effluent limitations for "best available technology," a similar clause, properly expanded in scope, is just as applicable to the 1983 requirements as to the 1977.

III. FINDING JURISDICTION DOES NOT REQUIRE ACCEPTANCE OF NRDC'S CALL FOR NATIONALLY UNIFORM EFFLUENT LIMITATIONS

NRDC urges that this court has jurisdiction because the Administrator is at least allowed to promulgate regulations establishing effluent limitations under § 301(b) and has done

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[119] For example, Congress included "non-water quality environmental impact" in the § 304(b) factors, and presumably the Administrator will consider such impacts as air pollution in developing the guidelines. Air pollution impacts are therefore not a "fundamentally different factor." Consequently, if achieving a prescribed effluent level at a particular plant would do more harm to air than it would prevent to water, the present flexibility clause would not allow the permit grantor to depart from the published limitation.

so.[120] As demonstrated above, however, the Act does not allow effluent limitations to be set by regulation.

Even if that were not true, a determination that the Act allows effluent limitations to be set by regulation does not lead inexorably to the conclusion that effluent limitations must be set only by regulation, a conclusion essential to the NRDC "merits" argument for inflexibly uniform, nationwide effluent limitations.

Moreover, it is useful to note that the matter of jurisdiction can be resolved on grounds other than those urged to date by the parties, and without the necessity to determine at the jurisdictional threshold whether EPA has authority to promulgate effluent limitations by regulation under § 301(b). These other grounds are especially significant should weight be given considerations concerning the directness and immediacy of courts of appeals' review of regulations issued by EPA.

In question is the courts of appeals' jurisdiction under § 509(b)(1)(E) to review "the Administrator's action . . . in approving or promulgating any effluent limitation or other limitation under sections 301, 302 or 306 . . . ."[121] Action

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[120] EPA's position on jurisdiction is not yet clear. However, judging from the Agency's memorandum of February 25, 1974, attached as Appendix B to the Brief for Intervenors, it too will deem jurisdiction determined by the nature of the regulations it has published.

[121] 33 U.S.C. § 1369(b)(1)(E).

by the Administrator (i.e., approving or promulgating) which relates to limitations under these enumerated sections may confer jurisdiction, regardless of the section under which he acts. Similarly, publication of § 304(b) guidelines amounts to prior "approval" of later § 301 effluent limitations that are consistent with the guidelines.

In short, the jurisdictional question can be resolved on discrete grounds, not tied to the substantive issues raised. Further, a finding of jurisdiction even on the "merits" grounds urged by NRDC need result in neither approval of nationally uniform effluent limitations, nor condemnation of EPA's flexibility provision.

CONCLUSION

As stated at the outset, our principal concern is the merits -- EPA should have published effluent guidelines with presumptive effect, not inflexibly binding effluent limitations. Accordingly, the flexibility contemplated by the challenged provision is a necessary part of the contested regulations.

Should the court conclude that it has jurisdiction over this action, it should deny the relief sought by Petitioner. It should also direct the Agency to clarify the status of its regulations as guidelines or, alternatively, to expand the flexibility provision to cover cases in which the facts differ fundamentally from those on which the Agency relied and to include a similar provision in the effluent limitation guidelines for 1983.

Respectfully submitted,

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700 East Main Street
Richmond, Virginia 23219

Dated: August 30, 1974

APPENDIX A

Members of the Utility Water Act Group

Allegheny Power Service Corporation
  for Monongahela Power Company
      The Potomac Edison Company
      West Penn Power Company
American Electric Power Company
  for Appalachian Power Company
      Indiana & Michigan Electric Company
      Kentucky Power Company
      Ohio Power Company
Baltimore Gas and Electric Company
Boston Edison Company
Carolina Power & Light Company
Commonwealth Edison Company
Consolidated Edison Co. of New York, Inc.
Consumers Power Company
The Detroit Edison Company
Duke Power Company
Florida Power & Light Company
Illinois Power Company
Long Island Lighting Company
Middle South Utilities, Inc.
Montaup Electric Company
National Rural Electric Cooperative Association
New England Power Company
Northeast Utilities
  for Connecticut Light and Power Company
      Hartford Electric Light Company
      Western Massachusetts Electric Company
Pacific Gas & Electric Company
Pennsylvania Power & Light Company
Philadelphia Electric Company
Potomac Electric Power Company
Public Service Company of New Hampshire
Public Service Electric & Gas Company
San Diego Gas & Electric Company
South Carolina Electric & Gas Company
Southern California Edison Company
Southern Services, Inc.
  for Alabama Power Company
      Georgia Power Company
      Gulf Power Company
      Mississippi Power Company
Tampa Electric Company
Tennessee Valley Authority
Union Electric Company
Virginia Electric and Power Company
Wisconsin Electric Power Company

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

NATURAL RESOURCES DEFENSE COUNCIL, INC.	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil Action No. 1609-73
	)	
RUSSELL E. TRAIN, et al.	)	
	)	
Defendants	)	
	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF
MOTION FOR MODIFICATION OF ORDER

INTRODUCTION

Since this Court's order of November 27, 1973, establishing specific deadlines for promulgation of effluent limitation guidelines for specific industrial categories, Defendants have made every effort to meet those deadlines. It became apparent in March, 1974, that the deadlines for Group I Phase I could not all be met for various reasons. The Defendants requested and were granted an extension of those deadlines by an order of March 14, 1974. Twenty-nine of the thirty Phase I Regulations now have been promulgated. For the reasons set forth in this Memorandum and in the accompanying Affidavit, Defendants are now requesting additional modifications in the Order of this Court with respect to the Group I Phase II industry categories and the one remaining Phase I industry, steam electric powerplants.

A. Group I, Phase II Modifications

Since the issuance of this court's original order requiring promulgation of effluent limitations guidelines for all point source categories, Defendants have worked diligently and with great effort to meet the requirements of that order. Twenty-nine sets of regulations have now been promulgated covering a substantial portion of industrial dischargers. They are now moving into the next portion of the order which addresses Phase II of Group I, nineteen additional sets of regulations.

The Agency has made significant progress in the development of these regulations and three sets of proposed regulations have been signed by the Administrator. Several additional proposals are expected in the very near future. However, it has become apparent that compliance with the schedule envisioned over eight months ago is not possible and that modification of that schedule is necessary. Defendants recognize the importance of these regulations being issued as soon as possible and this Court's concern that the process proceed without unwarranted delay. However, the necessity for legally supportable limitations and the unavoidable occurrence of delaying events justifys the additional time requested in this motion before final promulgation.

The principal reasons for the Phase II delays fall into several identifiable areas. First, the intense efforts required for the staff of EPA to finalize the Phase I regulations has made it impossible to devote the necessary time to Phase II. Essentially the same agency and contractor personnel responsible for Phase I are responsible for Phase II, both for reasons of limited resources and for reasons of continuity. Moreover, the burdens of Phase I contributed to personnel departures which caused disruption in the development of the regulations.

Second, there have been inadequacies in the data collection process which have necessitated requiring contractors to do additional work to correct the deficiencies. Having a complete data base is, of course, crucial to the development of defensible regulations. This necessarily delays other elements of the regulation development process which can occur only after the data base is complete. Third, significant additional burdens have been imposed on the Agency with respect to the Phase I regulations in the form of a substantial number of court challenges to the regulations and Congressional hearings and inquiries.

A more specific discussion of the reasons for the delays are contained in the accompanying Affidavit of Lillian Rogelson, Deputy Assistant Administrator for Water Planning and Standards. As an adjunct to the

statements set forth there, we believe it is appropriate to outline briefly the process employed by the Agency in developing the regulations and how the various events affect the overall program.

The Federal Water Pollution Control Act requires that many factors be taken into account in promulgating regulations, including the total cost of the technology to be applied, the benefits to be achieved, the age of the facilities involved and the processes they employ, engineering considerations, process changes and non-water quality environmental impacts including energy requirements (§304(b)). In order to obtain the overall data base necessary to accomplish that task, the Agency contracted with qualified technical consultants, who contract to study a particular industry or segment of an industry under the supervision and with the assistance of EPA.

A contractor's work results in a report which: (1) describes the industry and its processes, (2) categorizes the industry, as appropriate, (3) describes the water use patterns and waste problems of the industry, (4) selects those pollutants which should be subjected to control, (5) describes the control and treatment technologies which can be used to treat those pollutants, (6) analyzes the cost, energy, and non-water quality aspects of those technologies and, (7) recommends standards which are appropriate in the light of that information and the statutory requirements. This report is usually about 200 pages in length; in some instances it has been as long as 800 pages. To gather the data for the report, the contractor reviews appropriate technical literature, consults the industry, and visits plants and conducts appropriate tests. Where necessary, the Agency invokes its rights of entry, inspection and monitoring under §308 of the Act to enable the contractor to gather this data. When finished, the contractor's report is made available for a thirty day public comment period (in accordance with procedures set forth in 38 Fed. Reg. 21202-21206).

In the meantime, EPA will have contracted with another consultant to conduct a supplementary study focusing on the economic impact which could result from application of alternative control and treatment technologies.

That study can not begin, however, until the first contractor has submitted information on alternative control technologies and the investment and operating costs associated with them. The economic consultant then uses that information to estimate the broader economic effects that might result in terms of product price increases, employment, viability of plants, foreign trade, and other effects.

These reports are also made available to the public. Both reports and the comments thereon from the public, industry, and other agencies go through intensive internal review after which a proposed regulation is published. The proposal is accompanied by a statement of basis and purpose; in addition, a proposed "Development Document" and an "Economic Analysis" are prepared. As required by the Administrative Procedure Act, the proposal is made available for public comment and the comments are then considered and a final regulation and final copies of the various documents and studies are prepared.

A delay in one part of that process inevitably affects the final promulgation date. The Agency generally contracts with a single consultant to prepare the studies needed in connection with both Phase I and Phase II of a particular industry. If complications and delays arise with regard to the contractor's work on Phase I, its work on Phase II is also delayed. The contractor may not have sufficient manpower to revise Phase I and work on Phase II simultaneously. Furthermore, it may be prudent for the contractor to correct its Phase I mistakes before proceeding to Phase II so that those mistakes will not be repeated. If the contractor's work on Phase II is delayed, so is final promulgation of Phase II.

Delays may also occur because industry comments, requests for hearings, or lawsuits filed on Phase I Regulations may preempt a Project Officer's time. The Project Officer for Phase I is generally assigned to Phase II of the same industry, so that if he is burdened with post-promulgation Phase I responsibilities, his work on Phase II is delayed. He and those working with him are the only persons with the expertise necessary to answer questions on

Phase I and the familiarity with the industry which is necessary for progress on Phase II. Delays resulting from held-over Phase I responsibilities occurred in connection with numerous industries; for example, corrections to the promulgated regulations have been proposed or published for 12 industries.

Even if work on Phase II started without delay, the contractor often encountered delays in studying the industry. In some cases industry or other governmental bodies were either uncooperative or late in submitting needed data (see, infra, reports on the Seafood, Glass, and Iron and Steel industries). In other cases, contractors researching industries comprised of small firms encountered problems peculiar to the study of such industries (see, infra, reports on Plastics, Asbestos, and Meat industries). At times the Agency felt that the data gathered might not be sufficient to resist challenge and required that more data be collected (see, infra, the reports on the Electroplating, Ferroalloys, Grain, and Pulp and Paper industries). At other times delays ensued because the length of time required to derive formulae on new and developing technologies cannot be foretold in advance (see, infra, the reports on the Timber, Nonferrous, and Sugar industries).

Personnel changes within the Agency resulted in some delay in seven industrial categories. In three cases, there were difficulties in negotiating contracts with the consultants (see, infra, reports on Organic Chemicals, Sugar, Pulp and Paper). Delays often developed during the studies of economic impact. These problems occurred in combination, not singly. A full description is set forth in the industry by industry reports appended to the affidavit.

These reports make it evident that forcing the Agency to rush the promulgation of regulations can be counter-productive. A "rush-job" creates a pressured atmosphere which cannot be sustained indefinitely. When personnel leave in order to escape such demands, delays ensue which could be avoided were the work to proceed at a more sustainable pace.

The greater danger in working hastily is that regulations of inferior technical quality might inadvertantly be produced. If unchallenged, such regulations would cause industry and the nation to bear either unnecessary amounts of pollution or unnecessary diseconomies. If challenged, such a regulation would fail to pass judicial scrutiny and, a year or so having passed, the Agency would have to reformulate the regulations. At that time, the staff that developed the original regulation may have dispersed. New consultants would have to be hired. In short, regulation of that industry could be delayed for years.

A final factor which should be emphasized is the impact of the Phase I promulgations. Over 100 lawsuits have been filed thus far challenging the regulations for 24 industrial categories, and more suits are expected. Preparing the defenses of these regulations is obviously a time consuming job for the staff who worked on the Phase I regulations and is an addition to Phase II obligations.* There have also been a significant number of inquiries from and meetings with industry representatives regarding interpretations of the Phase I regulations. This has resulted in the necessity to correct or propose revision to numerous Phase I regulations. This emphasizes not only the fact that promulgation does not terminate the Agency's obligations on Phase I but also the necessity for the fullest possible documentation and analysis prior to promulgation to insure the correctness of the regulations and avoid the delays in implementing the regulation discussed above.

Finally, we should also note the impact of Phase I in focusing attention on the regulations covered by this court order. In addition to the industry meetings and court challenges, Congressional interest has increased. Three separate sets of hearings have been held by Congressional

* The records certified to the courts of appeals in ligitation involving 18 industries total over 74,000 pages.

committees requiring appearances by EPA staff. Preparation for their appearances again detracts from substantive work on the regulations. Written requests from members of Congress for information and explanations have also increased in number and scope. These additional demands on the Agency cannot be ignored when analyzing the progress that has or has not been made and should be considered in determining when promulgation of the Phase II regulations can be reasonably expected.

B. Group I, Phase I Modifications - Steam Electric Power Plants

On November 27, 1973, this Court established a deadline for promulgation of regulations for the steam electric power industry of July 30, 1974. In April, 1974, this date was extended until August 26. Events since April now require a second, and final, extension of 30 days.

There are five principal reasons why the Agency requires additional time in order to promulgate environmentally sound and legally supportable regulations.

1. The interrelated set of regulations affecting the power industry is extraordinarily complex both technically and conceptually.

The regulations to be issued under section 301, 304 and 306 (establishing the technologically based limits for the discharge of heat and chemical pollutants from new and existing power plants) cannot be separated from the regulations required to implement section 316(a) (which establishes a variance procedure on the limits otherwise imposed on thermal discharges). The exemption provided by section 316(a) is based on a demonstration by the particular power plant of the biological needs of the aquatic community in the affected receiving water. Both regulations entail a formidable array of technical and scientific judgments. Each must complement the other if a technically, economically and environmentally coherent regulatory policy is to be effected.

Section 316(a) is an anomoly in the Act; for no other industry need comparable decisions be made not only as to the technical feasibility of control measures but as to the precise environmental need for particular

levels of control in particular situations as well. Meshing of these two very different but definitely related regulatory strands has proved to be one of the most difficult tasks imposed on the Agency by the 1972 Act.

2. The potential economic and environmental consequences of these regulations are enormous.

The Agency estimated the total capital cost by 1983 of its proposed regulations at $9 billion. The industry (through Amici) estimates the cost at $48 billion. $48 billion dollars is a staggeringly large sum even for an industry as large and as capital intensive as the power industry. Even a $9 billion outlay far surpasses the cost imposed on any other industry; indeed it represents a significant portion of the cost of all industrial pollution control by 1983. In addition, the proposed regulations will increase the industry's use of fuel both through the energy required to operate the control technologies and the inefficiencies on power generation which those technologies entail. The Agency must weigh its decision carefully for the economic and energy, as well as the environmental, stakes are high.

3. The Agency has received an extraordinary volume of comments on its proposed regulations of substantial technical sophictication.

Hundreds of comments on proposed regulations under 301, 306 and 316 have been received. A high proportion of these comments contain extensive and detailed discussions of legal, biological, engineering and economic issues. Amici alone submitted four volumes containing over a thousand pages which address in detail virtually every significant aspect of these regulations.

4. The industry, through Amici, has pressed a vigorous procedural assault on the Agency. On May 29, Amici, through its counsel, filed an extensive Freedom of Information Act request for all material in the Agency's possession relevant to any of the regulations. Since then approximately 15,000 documents have been identified in the Agency's Washington office, laboratories and Regional Offices and supplied to Amici and this effort, which of course consumes technical and legal staff time, is continuing.

On the same day Amici submitted 95 specific "interrogatories" to the Agency probing the factual basis for its proposals and the legal and policy rationales behind them. Responding to these consumed considerable staff time and effort. On July 26 a second set of comparable bulk were filed.

In response to Amici's demands for "meaningful participation in the rulemaking process" the Agency held two days of public hearings (on July 10 and 11) on the proposed regulations. Agency personnel from Regional Offices, laboratories and all headquarters programs were involved in preparation for, participation in, and review of the transcript of the hearings.

5. Congress and other Federal agencies are intensely concerned with the Agency's proposals.

The House Public Works Committee held public hearings specifically directed to the Agency's proposals for this industry. Other Federal agencies with responsibilities in energy generation or regulation and environmental protection (the Atomic Energy Commission, Federal Energy Administration, Federal Power Commission, Tennessee Valley Authority, the Departments of Commerce and Interior) are naturally deeply concerned with the effect of these regulations. The participation of the industry, the Congress and sister agencies, while constructive and frequently helpful, has in the aggregate substantially contributed to the delay in the development of the regulations.

Since the request for proposal was issued in October, 1972, the agency has spent hundreds of thousands of dollars and invested countless man years of its staff resources to study the water pollution problems of the power industry and develop a proposal for its control. The work is nearly complete; voluminuous comments are being assimilated, the technical and policy issues narrowed to manageable scope.

It would be a tragedy were all of this effort and concern to be jeporadized through hastily made decisions on these complex matters. Thirty

days is a short time in the context of Federal regulation of the power industry; power plants last thirty years and the industry will be with us for the foreseeable future. The Agency needs 30 days, no more, to regulate this industry wisely. We ask the court for the authority to take those 30 extra days.

Respectfully submitted,

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APPENDIX C

Industrial Categories and Subcategories for which EPA must Publish Effluent Limitation Guidelines

Category
Subcategories and Segments

Cement Manufacturing

Phosphate Manufacturing
Phosphorus Serviced Chemicals

Insulation Fiberglass Manufacturing

Beet Sugar Processing
Beet Sugar and Cane Sugar Refining

Electroplating
Copper, Nickel, Chrome and Zinc

Inorganic Chemicals Manufacturing
Major Inorganic Products

Rubber Processing
Tire and Synthetic

Feedlots

Plastic and Synthetic Materials Manufacturing
Synthetic Resins

Glass Manufacturing
Insulation Fiberglass Flat Glass

Ferroalloy Manufacturing
Smelting and Slag Processing

Meat Product and Rendering Processing

Asbestos Manufacturing
Building and Paper Products

Canned and Preserved Fruits and Vegetables Processing
Citrus, Apple and Potatoes

Pulp, Paper and Paperboard Mills
Unbleached Kraft and Semichemical Pulp

Builders Paper and Board Mills
Builders Paper and Roofing Felt

Dairy Product Processing

Grain Mills
Grain Processing

Canned and Preserved Seafood Processing
Catfish, Crab, Shrimp and Tuna

Sugar Processing

Textile Mills

Organic Chemicals Manufacturing
Major Organic Products

Soap and Detergent Manufacturing

Fertilizer Manufacturing
Basic Fertilizer Chemicals

Petroleum Refining

Iron and Steel Manufacturing

Nonferrous Metals Manufacturing
Bauxite Refining, Primary Aluminum Smelting and Secondary Aluminum Smelting

Steam Electric Power Plants
Steam Electric Power Cooling Water Intake Structure Technology

Leather Tanning and Finishing

Timber Products Processing
Plywood, Hardwood and Wood Preserving

Pulp, Paper and Paperboard Mills
Balance of Industry

Builders Paper and Board Mills
Rigid Building Board

Meat Product and Rendering Processing
Red Meat Processing

Grain Mills
Blended Flour, Pet Food, Prepared Feed, Cereals

Canned and Preserved Fruits and Vegetable Processing

Canned and Preserved Seafood Processing
Oyster, Clam, Anchovy, Mehaden and Bottom Fish

Electroplating
Metal Finishing

Organic Chemicals Manufacutring
Cyclics, Dyes and Pigments (Balance)

Inorganic Chemicals Manufacturing
Alkalies and Chlorine (Balance), Industrial Gases, Inorganic Pigments (Balance), Industrial Inorganic Chemicals

Plastic and Synthetic Materials Manufacturing
Balance (Except Glass)

Fertilizer Manufacturing
Nitrogenous Fertilizer, Granulated and Prilled Ammonium Sulfate, By-Product Ammonium Sulfate and Mixed Ferilizer

Iron and Steel Manufacturing
Blast Furnaces, Balance of Rolling Mills, Electrometallurgical, Steel Wire Drawing, Steel Nails, Spikes, Steel Sheet, Strip and Bars, Steel Pipe and Tubes, Gray Iron Foundries, Malleable Iron Foundries, Steel Foundries

Nonferrous Metal Manufacturing
Copper, Lead and Zinc Industries

Phosphate Manufacturing
Industrial Inorganic Chemical (Balance) Sodium Phosphates and Pyro Phasphates, Potassium Phosphates and Pyro Phosphates, Phosphatic Fertilizers (Partial), Deflourinated Phosphate Rock, Deflourinated Phosphoric Acid, Deflourinated Mono and Diammounium Phosphates

Ferroalloy Manufacturing
Blast Furnaces, Steel Works and Rolling Mills, Electrometallurgical Products (Partial), Steel Wire Drawing, Nails and Spikes (Partial), Cold Rolled Steel Sheet, Strip and Bars (Partial) Steel Pipe and Tubes (Partial), Steel Foundries (Partial)

Glass Manufacturing
Glass Container Manufacturing Processing

Asbestos Manufacturing
Asbestos Products (Balance), Gaskets, Packing, and Sealing Devices

Rubber Processing
Rubber Footwear

Timber Products Processing
Wood Transport, Logging Camps, Saw and Planning, Hardwood Dimension and Flooring, Mill Work, Prefabricated Structure

Machinery and Mechanical Products Manufacturing

Coal Mining

Petroleum and Gas Extraction, Handling, Storage and Residues Disposal

Mineral Mining and Processing

Water Supply

Miscellaneous Foods and Beverages

Miscellaneous Chemicals

Ore Mining and Dressing

Transportation Industries

Fish Hatcheries and Farms

Paving and Roofing Materials (Tars and Asphalt)

Auto and Other Laundries

Converted Paper Products

Paint and Ink Formulation and Printing

Steam Supply

Miscellaneous Mineral Products

Public Warehousing

Groceries and Related Products

Petroleum and Petroleum Products

Research and Development Laboratories

Hospitals

Polishes and Sanitation Goods

Surface Active Agents

Toilet Preparations

Cut Stone and Stone Products

Fuel Oil Dealers

Automotive Repair Services

Crude Petroleum Pipelines

Refined Petroleum Pipelines

Sanitary Services, Including Storm Sewers

Irrigation Systems

Structural Clay Products

Pottery and Related Products

Concrete, Gypsum, and Plaster Products

Furniture and Fixtures Manufacturing

Point Source Discharge Categories Not Otherwise Covered

FEDERAL WATER POLLUTION CONTROL ACT

33 U.S.C. § 1251

"DECLARATION OF GOALS AND POLICY

"SEC. 101. (a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—

"(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

"(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

"(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

"(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

"(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

"(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

"(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

"(c) It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

"(d) Except as otherwise expressly provided in this Act, the Administrator of the Environmental Protection Agency (hereinafter in this Act called 'Administrator') shall administer this Act.

"(e) Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

"(f) It is the national policy that to the maximum extent possible the procedures utilized for implementing this Act shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

33 U.S.C. § 1311

"EFFLUENT LIMITATIONS

"SEC. 301. (a) Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

"(b) In order to carry out the objective of this Act there shall be achieved—

"(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act; and

"(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act; or,

"(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 510) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

"(2)(A) not later than July 1, 1983, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307 of this Act; and

"(B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 201(g)(2)(A) of this Act.

"(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

"(d) Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

"(e) Effluent limitations established pursuant to this section or section 302 of this Act shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act.

"(f) Notwithstanding any other provisions of this Act it shall be unlawful to discharge any radiological, chemical, or biological warfare agent or high-level radioactive waste into the navigable waters.

33 U.S.C. § 1312

"WATER QUALITY RELATED EFFLUENT LIMITATIONS

"SEC. 302. (a) Whenever, in the judgment of the Administrator, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 301(b)(2) of this Act, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

"(b)(1) Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitation and within ninety days of such notice hold a public hearing to determine the relationship of the economic and social costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this Act) and to determine whether or not such effluent limitations can be implemented with available technology or other alternative control strategies.

"(2) If a person affected by such limitation demonstrates at such hearing that (whether or not such technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this Act), such limitation shall not become effective and the Administrator shall adjust such limitation as it applies to such person.

"(c) The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 301 of this Act.

33 U.S.C. § 1313

"WATER QUALITY STANDARDS AND IMPLEMENTATION PLANS

"SEC. 303. (a)(1) In order to carry out the purpose of this Act, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. If the Administrator makes such a determination he shall, within three months after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

"(2) Any State which, before the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this Act unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

"(3)(A) Any State which prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, adopt and submit such standards to the Administrator.

"(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, he shall approve such standards.

"(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

"(b)(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, if—

"(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section,

"(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

"(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

"(c)(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with the date of enactment of the Federal Water Pollution Control Act Amendments of 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

"(2) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

"(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this Act, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this Act, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

"(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

"(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this Act, or

"(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this Act.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this Act.

"(d)(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

"(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 301 are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

"(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

"(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

"(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 304(a)(2)(D), for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall

either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

"(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 304(a)(2) as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

"(e)(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this Act.

"(2) Each State shall submit not later than 120 days after the date of the enactment of the Water Pollution Control Amendments of 1972 to the Administrator for his approval a proposed continuing planning process which is consistent with this Act. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this Act. The Administrator shall not approve any State permit program under title IV of this Act for any State which does not have an approved continuing planning process under this section.

"(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

"(A) effluent limitations and schedules of compliance at least as stringent as those required by section 301(b)(1), section 301(b)(2), section 306, and section 307, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

"(B) the incorporation of all elements of any applicable area-wide waste management plans under section 208, and applicable basin plans under section 209 of this Act;

"(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

"(D) procedures for revision;

"(E) adequate authority for intergovernmental cooperation;

"(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

"(G) controls over the disposition of all residual waste from any water treatment processing;

"(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 301 and 302.

"(f) Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 301(b)(1) and 301(b)(2) nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

"(g) Water quality standards relating to heat shall be consistent with the requirements of section 316 of this Act.

"(h) For the purposes of this Act the term 'water quality standards' includes thermal water quality standards.

33 U.S.C.§ 1314

"INFORMATION AND GUIDELINES

"SEC. 304. (a)(1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after the date of enactment of this title (and from time to time thereafter revise) criteria for water quality accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare including, but not limited to, plankton, fish, shellfish, wildlife, plant life, shorelines, beaches, esthetics, and recreation which may be expected from the presence of pollutants in any body of water, including ground water; (B) on the concentration and dispersal of pollutants, or their byproducts, through biological, physical, and chemical processes; and (C) on the effects of pollutants on biological community diversity, productivity, and stability, including information on the factors affecting rates of eutrophication and rates of organic and inorganic sedimentation for varying types of receiving waters.

"(2) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after the date of enactment of this title (and from time to time thereafter revise) information (A) on the factors necessary to restore and maintain the chemical, physical, and biological integrity of all navigable waters, ground waters, waters of the contiguous zone, and the oceans; (B) on the factors necessary for the protection and propagation of shellfish, fish, and wildlife for classes and categories of receiving waters and to allow recreational activities in and on the water; and (C) on the measurement and classification of water quality; and (D) for the purpose of section 303, on and the identification of pollutants suitable for maximum daily load measurement correlated with the achievement of water quality objectives.

"(3) Such criteria and information and revisions thereof shall be issued to the States and shall be published in the Federal Register and otherwise made available to the public.

"(b) For the purpose of adopting or revising effluent limitations under this Act the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of enactment of this title, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

"(1)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

"(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 301 of this Act shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

"(2)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

"(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 301 of this Act to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate; and

"(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants.

"(c) The Administrator, after consultation, with appropriate Federal and State agencies and other interested persons, shall issue to the States and appropriate water pollution control agencies within 270 days after enactment of this title (and from time to time thereafter) information on the processes, procedures, or operating methods which result in the elimination or reduction of the discharge of pollutants to implement standards of performance under section 306 of this Act. Such information shall include technical and other data, including costs, as are available on alternative methods of elimination or reduction of the discharge of pollutants. Such information, and revisions thereof, shall be published in the Federal Register and otherwise shall be made available to the public.

"(d)(1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall publish within sixty days after enactment of this title (and from time to time thereafter) information, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, on the degree of effluent reduction attainable through the application of secondary treatment.

"(2) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall publish within nine months after the date of enactment of this title (and from time to time thereafter) information on alternative waste treatment management techniques and systems available to implement section 201 of this Act.

"(e) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 208 of this Act, within one year after the effective date of this subsection (and from time to time thereafter) information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from—

"(A) agricultural and silvicultural activities, including runoff from fields and crop and forest lands;

"(B) mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines;

"(C) all construction activity, including runoff from the facilities resulting from such construction;

"(D) the disposal of pollutants in wells or in subsurface excavations;

"(E) salt water intrusion resulting from reductions of fresh water flow from any cause, including extraction of ground water, irrigation, obstruction, and diversion; and

"(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

Such information and revisions thereof shall be published in the Federal Register and otherwise made available to the public.

"(f)(1) For the purpose of assisting States in carrying out programs under section 402 of this Act, the Administrator shall publish, within one hundred and twenty days after the date of enactment of this title, and review at least annually thereafter and, if appropriate, revise guidelines for pretreatment of pollutants which he determines are not susceptible to treatment by publicly owned treatment works. Guidelines under this subsection shall be established to control and prevent the discharge into the navigable waters, the contiguous zone, or the ocean (either directly or through publicly owned treatment works) of any pollutant which interferes with, passes through, or otherwise is incompatible with such works.

"(2) When publishing guidelines under this subsection, the Administrator shall designate the category or categories of treatment works to which the guidelines shall apply.

"(g) The Administrator shall, within one hundred and eighty days from the date of enactment of this title, promulgate guidelines establishing test procedures for the analysis of pollutants that shall include the factors which must be provided in any certification pursuant to section 401 of this Act or permit application pursuant to section 402 of this Act.

"(h) The Administrator shall (1) within sixty days after the enactment of this title promulgate guidelines for the purpose of establishing uniform application forms and other minimum requirements for the acquisition of information from owners and operators of point sources of discharge subject to any State program under section 402 of this Act, and (2) within sixty days from the date of enactment of this title promulgate guidelines establishing the minimum procedural and other elements of any State program under section 402 of this Act which shall include:

"(A) monitoring requirements;

"(B) reporting requirements (including procedures to make information available to the public);

"(C) enforcement provisions; and

"(D) funding, personnel qualifications, and manpower requirements (including a requirement that no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit).

"(i) The Administrator shall, within 270 days after the effective date of this subsection (and from time to time thereafter), issue such information on methods, procedures, and processes as may be appropriate to restore and enhance the quality of the Nation's publicly owned fresh water lakes.

"(j)(1) The Administrator shall, within six months from the date of enactment of this title, enter into agreements with the Secretary of Agriculture, the Secretary of the Army, and the Secretary of the Interior to provide for the maximum utilization of the appropriate programs authorized under other Federal law to be carried out by such Secretaries for the purpose of achieving and maintaining water quality through appropriate implementation of plans approved under section 208 of this Act.

"(2) The Administrator, pursuant to any agreement under paragraph (1) of this subsection is authorized to transfer to the Secretary of Agriculture, the Secretary of the Army, or the Secretary of the Interior any funds appropriated under paragraph (3) of this subsection to supplement any funds otherwise appropriated to carry out appropriate programs authorized to be carried out by such Secretaries.

"(3) There is authorized to be appropriated to carry out the provisions of this subsection, $100,000,000 per fiscal year for the fiscal year ending June 30, 1973, and the fiscal year ending June 30, 1974.

33 U.S.C. § 1315

"WATER QUALITY INVENTORY

"SEC. 305. (a) The Administrator, in cooperation with the States and with the assistance of appropriate Federal agencies, shall prepare a report to be submitted to the Congress on or before January 1, 1974, which shall—

"(1) describe the specific quality, during 1973, with appropriate supplemental descriptions as shall be required to take into account seasonal, tidal, and other variations, of all navigable waters and the waters of the contiguous zone;

"(2) include an inventory of all point sources of discharge (based on a qualitative and quantitative analysis of discharges) of pollutants, into all navigable waters and the waters of the contiguous zone; and

"(3) identify specifically those navigable waters, the quality of which—

"(A) is adequate to provide for the protection and propagation of a balanced population of shellfish, fish, and wildlife and allow recreational activities in and on the water;

"(B) can reasonably be expected to attain such level by 1977 or 1983; and

"(C) can reasonably be expected to attain such level by any later date.

"(b)(1) Each State shall prepare and submit to the Administrator by January 1, 1975, and shall bring up to date each year thereafter, a report which shall include—

"(A) a description of the water quality of all navigable waters in such State during the preceding year, with appropriate supplemental descriptions as shall be required to take into account seasonal, tidal, and other variations, correlated with the quality of water required by the objective of this Act (as identified by the Administrator pursuant to criteria published under section 304(a) of this Act) and the water quality described in subparagraph (B) of this paragraph;

"(B) an analysis of the extent to which all navigable waters of such State provide for the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities in and on the water;

"(C) an analysis of the extent to which the elimination of the discharge of pollutants and a level of water quality which provides for the protection and propagation of a balanced population of shellfish, fish, and wildlife and allows recreational activities in and on the water, have been or will be achieved by the requirements of this Act, together with recommendations as to additional action necessary to achieve such objectives and for what waters such additional action is necessary;

"(D) an estimate of (i) the environmental impact, (ii) the economic and social costs necessary to achieve the objective of this Act in such State, (iii) the economic and social benefits of such achievement, and (iv) an estimate of the date of such achievement; and

"(E) a description of the nature and extent of nonpoint sources of pollutants, and recommendations as to the programs which must be undertaken to control each category of such sources, including an estimate of the costs of implementing such programs.

"(2) The Administrator shall transmit such State reports, together with an analysis thereof, to Congress on or before October 1, 1975, and annually thereafter.

33 U.S.C. § 1316

"NATIONAL STANDARDS OF PERFORMANCE

"SEC. 306. (a) For purposes of this section:

"(1) The term 'standard of performance' means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

"(2) The term 'new source' means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

"(3) The term 'source' means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

"(4) The term 'owner or operator' means any person who owns, leases, operates, controls, or supervises a source.

"(5) The term 'construction' means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises.

"(b)(1)(A) The Administrator shall, within ninety days after the date of enactment of this title publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

"pulp and paper mills;
"paperboard, builders paper and board mills;
"meat product and rendering processing;
"dairy product processing;
"grain mills;
"canned and preserved fruits and vegetables processing;
"canned and preserved seafood processing;
"sugar processing;
"textile mills;
"cement manufacturing;
"feedlots;
"electroplating;
"organic chemicals manufacturing;
"inorganic chemicals manufacturing;
"plastic and synthetic materials manufacturing;
"soap and detergent manufacturing;
"fertilizer manufacturing;
"petroleum refining;
"iron and steel manufacturing;
"nonferrous metals manufacturing;
"phosphate manufacturing;
"steam electric powerplants;
"ferroalloy manufacturing;
"leather tanning and finishing;
"glass and asbestos manufacturing;
"rubber processing; and
"timber products processing.

"(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.

"(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

"(3) The provisions of this section shall apply to any new source owned or operated by the United States.

"(c) Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

"(d) Notwithstanding any other provision of this Act, any point source the construction of which is commenced after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction or during the period of depreciation or amortization of such facility for the purposes of section 167 or 169 (or both) of the Internal Revenue Code of 1954, whichever period ends first.

"(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

33 U.S.C. § 1317

"TOXIC AND PRETREATMENT EFFLUENT STANDARDS

"SEC. 307. (a)(1) The Administrator shall, within ninety days after the date of enactment of this title, publish (and from time to time thereafter revise) a list which includes any toxic pollutant or combination of such pollutants for which an effluent standard (which may

include a prohibition of the discharge of such pollutants or combination of such pollutants) will be established under this section. The Administrator in publishing such list shall take into account the toxicity of each pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms.

"(2) Within one hundred and eighty days after the date of publication of any list, or revision thereof, containing toxic pollutants or combination of pollutants under paragraph (1) of this subsection, the Administrator, in accordance with section 553 of title 5 of the United States Code, shall publish a proposed effluent standard (or a prohibition) for such pollutant or combination of pollutants which shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and he shall publish a notice for a public hearing on such proposed standard to be held within thirty days. As soon as possible after such hearing, but not later than six months after publication of the proposed effluent standard (or prohibition), unless the Administrator finds, on the record, that a modification of such proposed standard (or prohibition) is justified based upon a preponderance of evidence adduced at such hearings, such standard (or prohibition) shall be promulgated.

"(3) If after a public hearing the Administrator finds that a modification of such proposed standard (or prohibition) is justified, a revised effluent standard (or prohibition) for such pollutant or combination of pollutants shall be promulgated immediately. Such standard (or prohibition) shall be reviewed and, if appropriate, revised at least every three years.

"(4) Any effluent standard promulgated under this section shall be at that level which the Administrator determines provides an ample margin of safety.

"(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

"(6) Any effluent standard (or prohibition) established pursuant to this section shall take effect on such date or dates as specified in the order promulgating such standard, but in no case more than one year from the date of such promulgation.

"(7) Prior to publishing any regulations pursuant to this section the Administrator shall, to the maximum extent practicable within the time provided, consult with appropriate advisory committees, States, independent experts, and Federal departments and agencies.

"(b)(1) The Administrator shall, within one hundred and eighty days after the date of enactment of this title and from time to time thereafter, publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works (as defined in section 212 of this Act) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards. Pretreatment standards under this subsection shall specify a time for compliance not to exceed three years from the date of promulgation and shall be established to prevent the discharge of any pollutant through treatment works (as defined in section 212 of this Act) which are publicly owned, which pollutant interferes with, passes through, or otherwise is incompatible with such works.

"(2) The Administrator shall, from time to time, as control technology, processes, operating methods, or other alternatives change, revise such standards following the procedure established by this subsection for promulgation of such standards.

"(3) When proposing or promulgating any pretreatment standard under this section, the Administrator shall designate the category or categories of sources to which such standard shall apply.

"(4) Nothing in this subsection shall affect any pretreatment requirement established by any State or local law not in conflict with any pretreatment standard established under this subsection.

"(c) In order to insure that any source introducing pollutants into a publicly owned treatment works, which source would be a new source subject to section 306 if it were to discharge pollutants, will not cause a violation of the effluent limitations established for any such treatment works, the Administrator shall promulgate pretreatment standards for the category of such sources simultaneously with the promulgation of standards of performance under section 306 for the equivalent category of new sources. Such pretreatment standards shall prevent the discharge of any pollutant into such treatment works, which pollutant may interfere with, pass through, or otherwise be incompatible with such works.

"(d) After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

33 U.S.C. § 1318

"INSPECTIONS, MONITORING AND ENTRY

"SEC. 308. (a) Whenever required to carry out the objective of this Act, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this Act; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 305, 311, 402, and 504 of this Act—

"(A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require; and

"(B) the Administrator or his authorized representative, upon presentation of his credentials—

"(i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and

"(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.

"(b) Any records, reports, or information obtained under this section (1) shall, in the case of effluent data, be related to any applicable effluent limitations, toxic, pretreatment, or new source performance standards, and (2) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof (other than effluent data), to which the Administrator has access under this section, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information, or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18 of the United States Code, except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this Act or when relevant in any proceeding under this Act.

"(c) Each State may develop and submit to the Administrator procedures under State law for inspection, monitoring, and entry with respect to point sources located in such State. If the Administrator finds that the procedures and the law of any State relating to inspection, monitoring, and entry are applicable to at least the same extent as those required by this section, such State is authorized to apply and enforce its procedures for inspection, monitoring, and entry with respect to point sources located in such State (except with respect to point sources owned or operated by the United States).

33 U.S.C. § 1319

"FEDERAL ENFORCEMENT

"SEC. 309. (a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 301, 302, 306, 307, or 308 of this Act in a permit issued by a State under an approved permit program under section 402 of this Act, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

"(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of 'federally assumed enforcement'), the Administrator shall enforce any permit condition or limitation with respect to any person—

"(A) by issuing an order to comply with such condition or limitation, or

"(B) by bringing a civil action under subsection (b) of this section.

"(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 301, 302, 306, 307, or 308 of this Act, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by him or by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

"(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 308 of this Act shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

"(b) The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

"(c)(1) Any person who willfully or negligently violates section 301, 302, 306, 307, or 308 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

"(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

"(3) For the purposes of this subsection, the term 'person' shall mean, in addition to the definition contained in section 502(5) of this Act, any responsible corporate officer.

"(d) Any person who violates section 301, 302, 306, 307, or 308 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator, or by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

"(e) Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

33 U.S.C. § 1325

"NATIONAL STUDY COMMISSION

"SEC. 315. (a) There is established a National Study Commission, which shall make a full and complete investigation and study of all of the technological aspects of achieving, and all aspects of the total economic, social, and environmental effects of achieving or not achieving, the effluent limitations and goals set forth for 1983 in section 301(b)(2) of this Act.

"(b) Such Commission shall be composed of fifteen members, including five members of the Senate, who are members of the Public Works committee, appointed by the President of the Senate, five members of the House, who are members of the Public Works committee, appointed by the Speaker of the House, and five members of the public appointed by the President. The Chairman of such Commission shall be elected from among its members.

"(c) In the conduct of such study, the Commission is authorized to contract with the National Academy of Sciences and the National Academy of Engineering (acting through the National Research Council), the National Institute of Ecology, Brookings Institution, and other nongovernmental entities, for the investigation of matters within their competence.

"(d) The heads of the departments, agencies and instrumentalities of the executive branch of the Federal Government shall cooperate with the Commission in carrying out the requirements of this section, and shall furnish to the Commission such information as the Commission deems necessary to carry out this section.

"(e) A report shall be submitted to the Congress of the results of such investigation and study, together with recommendations, not later than three years after the date of enactment of this title.

"(f) The members of the Commission who are not officers or employees of the United States, while attending conferences or meetings of the Commission or while otherwise serving at the request of the Chairman shall be entitled to receive compensation at a rate not in excess of the maximum rate of pay for grade GS-18, as provided in the General Schedule under section 5332 of title V of the United States Code, including traveltime and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence as authorized by law (5 U.S.C. 73b-2) for persons in the Government service employed intermittently.

"(g) In addition to authority to appoint personnel subject to the provisions of title 5, United States Code, governing appointments in the competitive service, and to pay such personnel in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, the Commission shall have authority to enter into contracts with private or public organization who shall furnish the Commission with such administrative and technical personnel as may be necessary to carry out the purpose of this section. Personnel furnished by such organizations under this subsection are not, and shall not be considered to be, Federal employees for any purposes, but in the performance of their duties shall be guided by the standards which apply to employees of the legislative branches under rules 41 and 43 of the Senate and House of Representatives, respectively."; and

(h) There is authorized to be appropriated, for use in carrying out this section, not to exceed $15,000,000.

33 U.S.C. § 1326

"THERMAL DISCHARGES

"SEC. 316. (a) With respect to any point source otherwise subject to the provisions of section 301 or section 306 of this Act, whenever the owner or operator of any such source, after opportunity for public hearing, can demonstrate to the satisfaction of the Administrator (or, if appropriate, the State) that any effluent limitation proposed for the control of the thermal component of any discharge from such source will require effluent limitations more stringent than necessary to assure the projection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made, the Administrator (or, if appropriate, the State) may impose an effluent limitation under such sections for such plant, with respect to the thermal component of such discharge (taking into account the interaction of such thermal component with other pollutants), that will assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on that body of water.

"(b) Any standard established pursuant to section 301 or section 306 of this Act and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.

"(c) Notwithstanding any other provision of this Act, any point source of a discharge having a thermal component, the modification of which point source is commenced after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 and which, as modified, meets effluent limitations established under section 301 or, if more stringent, effluent limitations established under section 303 and which effluent limitations will assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in or on the water into which the discharge is made, shall not be subject to any more stringent effluent limitation with respect to the thermal component of its discharge during a ten year period beginning on the date of completion of such modification or during the period of depreciation or amortization of such facility for the purpose of section 167 or 169 (or both) of the Internal Revenue Code of 1954, whichever period ends first.

33 U.S.C. § 1328

"AQUACULTURE

"SEC. 318. (a) The Administrator is authorized, after public hearings, to permit the discharge of a specific pollutant or pollutants under controlled conditions associated with an approved aquaculture project under Federal or State supervision.

"(b) The Administrator shall by regulation, not later than January 1, 1974, establish any procedures and guidelines he deems necessary to carry out this section.

33 U.S.C. § 1342

"NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

"SEC. 402. (a)(1) Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

"(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

"(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

"(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899, shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 13 of the Act of March 3, 1899, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act.

"(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899, after the date of enactment of this title. Each application for a permit under section 13 of the Act of March 3, 1899, pending on the date of enactment of this Act shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304(h)(2) of this Act, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act. No such permit shall issue if the Administrator objects to such issuance.

"(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

"(1) To issue permits which—

"(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403;

"(B) are for fixed terms not exceeding five years; and

"(C) can be terminated or modified for cause including, but not limited to, the following:

"(i) violation of any condition of the permit;

"(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

"(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

"(D) control the disposal of pollutants into wells;

"(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act, or

"(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act;

"(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

"(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

"(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

"(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

"(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

"(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

"(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308.

"(c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) of this Act. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

"(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(h)(2) of this Act.

"(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

"(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

"(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act.

"(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

"(c) In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 304 of this Act, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

"(f) The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

"(g) Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

"(h) In the event any condition of a permit for discharges from a treatment works (as defined in section 212 of this Act) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

"(i) Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act.

"(j) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

"(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505, with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act, or (2) section 13 of the Act of March 3, 1899, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899, the discharge by such source shall not be a violation of this Act if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

33 U.S.C. § 1343

"OCEAN DISCHARGE CRITERIA

"SEC. 403. (a) No permit under section 402 of this Act for a discharge into the territorial sea, the waters of the contiguous zone, or the oceans shall be issued, after promulgation of guidelines established under subsection (c) of this section, except in compliance with such guidelines. Prior to the promulgation of such guidelines, a permit may be issued under such section 402 if the Administrator determines it to be in the public interest.

"(b) The requirements of subsection (d) of section 402 of this Act may not be waived in the case of permits for discharges into the territorial sea.

"(c)(1) The Administrator shall, within one hundred and eighty days after enactment of this Act (and from time to time thereafter), promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans, which shall include:

"(A) the effect of disposal of pollutants on human health or welfare, including but not limited to plankton, fish, shellfish, wildlife, shorelines, and beaches;

"(B) the effect of disposal of pollutants on marine life including the transfer, concentration, and dispersal of pollutants or their byproducts through biological, physical, and chemical processes; changes in marine ecosystem diversity, productivity, and stability; and species and community population changes;

"(C) the effect of disposal, of pollutants on esthetic, recreation, and economic values;

"(D) the persistence and permanence of the effects of disposal of pollutants;

"(E) the effect of the disposal at varying rates, of particular volumes and concentrations of pollutants;

"(F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and

"(G) the effect on alternate uses of the oceans, such as mineral exploitation and scientific study.

"(2) In any event where insufficient information exists on any proposed discharge to make a reasonable judgment on any of the guidelines established pursuant to this subsection no permit shall be issued under section 402 of this Act.

33 U.S.C. § 1344

"PERMITS FOR DREDGED OR FILL MATERIAL

"SEC. 404. (a) The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

"(b) Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary of the Army (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary of the Army, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 403(c), and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

"(c) The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary of the Army. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

33 U.S.C. § 1361

"ADMINISTRATION

"SEC. 501. (a) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act.

"(b) The Administrator, with the consent of the head of any other agency of the United States, may utilize such officers and employees of such agency as may be found necessary to assist in carrying out the purposes of this Act.

"(c) Each recipient of financial assistance under this Act shall keep such records as the Administrator shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

"(d) The Administrator and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access, for the purpose of audit and examination, to any books, documents, papers, and records of the recipients that are pertinent to the grants received under this Act.

"(e)(1) It is the purpose of this subsection to authorize a program which will provide official recognition by the United States Government to those industrial organizations and political subdivisions of States which during the preceding year demonstrated an outstanding technological achievement or an innovative process, method, or device in their waste treatment and pollution abatement programs. The Administrator shall, in consultation with the appropriate State water pollution control agencies, establish regulations under which such recognition may be applied for and granted, except that no applicant shall be eligible for an award under this subsection if such applicant is not in total compliance with all applicable water quality requirements under this Act, or otherwise does not have a satisfactory record with respect to environmental quality.

"(2) The Administrator shall award a certificate or plaque of suitable design to each industrial organization or political subdivision which qualifies for such recognition under regulations established under this subsection.

"(3) The President of the United States, the Governor of the appropriate State, the Speaker of the House of Representatives, and the President pro tempore of the Senate shall be notified of the award by the Administrator and the awarding of such recognition shall be published in the Federal Register.

"(f) Upon the request of a State water pollution control agency, personnel of the Environmental Protection Agency may be detailed to such agency for the purpose of carrying out the provisions of this Act.

33 U.S.C. § 1362

"GENERAL DEFINITIONS

"SEC. 502. Except as otherwise specifically provided, when used in this Act:

"(1) The term 'State water pollution control agency' means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

"(2) The term 'interstate agency' means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

"(3) The term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

"(4) The term 'municipality' means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of this Act.

"(5) The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

"(6) The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) 'sewage from vessels' within the meaning of section 312 of this Act; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

"(7) The term 'navigable waters' means the waters of the United States, including the territorial seas.

"(8) The term 'territorial seas' means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

"(9) The term 'contiguous zone' means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

"(10) The term 'ocean' means any portion of the high seas beyond the contiguous zone.

"(11) The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

"(12) The term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

"(13) The term 'toxic pollutant' means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

"(14) The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

"(15) The term 'biological monitoring' shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

"(16) The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

"(17) The term 'schedule of compliance' means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

"(18) The term 'industrial user' means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category 'Division D—Manufacturing' and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

"(19) The term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

33 U.S.C. § 1365

"CITIZEN SUITS

"SEC. 505. (a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

"(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

"(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act.

"(b) No action may be commenced—

"(1) under subsection (a)(1) of this section—

"(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

"(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

"(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 306 and 307(a) of this Act. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

"(c)(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

"(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

"(d) The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

"(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

"(f) For purposes of this section, the term 'effluent standard or limitation under this Act' means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act; (2) an effluent limitation or other limitation under section 301 or 302 of this Act; (3) standard of performance under section 306 of this Act; (4) prohibition, effluent standard or pretreatment standards under section 307 of this Act; (5) certification under section 401 of this Act; or (6) a permit or condition thereof issued under section 402 of this Act, which is in effect under this Act (including a requirement applicable by reason of section 313 of this Act).

"(g) For the purposes of this section the term 'citizen' means a person or persons having an interest which is or may be adversely affected.

"(h) A Governor of a State may commence a civil action under subsection (a), without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this Act the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

33 U.S.C. § 1369

"ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW

"SEC. 509. (a)(1) For purposes of obtaining information under section 305 of this Act, or carrying out section 507(e) of this Act, the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for effluent data, upon a showing satisfactory to the Administrator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18 of the United States Code, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this Act, or when relevant in any proceeding under this Act. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subsection, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator, to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

"(2) The district courts of the United States are authorized, upon application by the Administrator, to issue subpenas for attendance and testimony of witnesses and the production of relevant papers, books, and documents, for purposes of obtaining information under sections 304 (b) and (c) of this Act. Any papers, books, documents, or other information or part thereof, obtained by reason of such a subpena shall be subject to the same requirements as are provided in paragraph (1) of this subsection.

"(b)(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 306, (B) in making any determination pursuant to section 306(b)(1)(C), (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 307, (D) in making any determination as to a State permit program submitted under section 402(b), (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306, and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

"(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

"(c) In any judicial proceeding brought under subsection (b) of this section in which review is sought of a determination under this Act required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in

such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

33 U.S.C. § 1371

"OTHER AFFECTED AUTHORITY

"SEC. 511. (a) This Act shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this Act; (2) affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation or (B) under the Act of March 3, 1899 (30 Stat. 1112); except that any permit issued under section 404 of this Act shall be conclusive as to the effect on water quality of any discharge resulting from any activity subject to section 10 of the Act of March 3, 1899, or (3) affecting or impairing the provisions of any treaty of the United States.

"(b) Discharges of pollutants into the navigable waters subject to the Rivers and Harbors Act of 1910 (36 Stat. 593; 33 U.S.C. 421) and the Supervisory Harbors Act of 1888 (25 Stat. 209; 33 U.S.C. 441–451b) shall be regulated pursuant to this Act, and not subject to such Act of 1910 and the Act of 1888 except as to effect on navigation and anchorage.

"(c)(1) Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 201 of this Act, and the issuance of a permit under section 402 of this Act for the discharge of any pollutant by a new source as defined in section 306 of this Act, no action of the Administrator taken pursuant to this Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 852); and

"(2) Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to—

"(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this Act or the adequacy of any certification under section 401 of this Act; or

"(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this Act.

(d) Notwithstanding this Act or any other provision of law, the Administrator (1) shall not require any State to consider in the development of the ranking in order of priority of needs for the construction of treatment works (as defined in title II of this Act), any water pollution control agreement which may have been entered into between the United States and any other nation, and (2) shall not consider any such agreement in the approval of any such priority ranking.

33 U.S.C. § 1374

"EFFLUENT STANDARDS AND WATER QUALITY INFORMATION ADVISORY COMMITTEE

"SEC. 515. (a)(1) There is established on Effluent Standards and Water Quality Information Advisory Committee, which shall be composed of a Chairman and eight members who shall be appointed by the Administrator within sixty days after the date of enactment of this Act.

"(2) All members of the Committee shall be selected from the scientific community, qualified by education, training, and experience to provide, assess, and evaluate scientific and technical information on effluent standards and limitations.

"(3) Members of the Committee shall serve for a term of four years, and may be reappointed.

"(b)(1) No later than one hundred and eighty days prior to the date on which the Administrator is required to publish any proposed regulations required by section 304(b) of this Act, any proposed standard of performance for new sources required by section 306 of this Act, or any proposed toxic effluent standard required by section 307 of this Act, he shall transmit to the Committee a notice of intent to propose such regulations. The Chairman of the Committee within

ten days after receipt of such notice may publish a notice of a public hearing by the Committee, to be held within thirty days.

"(2) No later than one hundred and twenty days after receipt of such notice, the Committee shall transmit to the Administrator such scientific and technical information as is in its possession, including that presented at any public hearing, related to the subject matter contained in such notice.

"(3) Information so transmitted to the Administrator shall constitute a part of the administrative record and comments on any proposed regulations or standards as information to be considered with other comments and information in making any final determinations.

"(4) In preparing information for transmittal, the Committee shall avail itself of the technical and scientific services of any Federal agency, including the United States Geological Survey and any national environmental laboratories which may be established.

"(c)(1) The Committee shall appoint and prescribe the duties of a Secretary, and such legal counsel as it deems necessary. The Committee shall appoint such other employees as it deems necessary to exercise and fulfill its powers and responsibilities. The compensation of all employees appointed by the Committee shall be fixed in accordance with chapter 51 and subchapter III of chapter 53 of title V of the United States Code.

"(2) Members of the Committee shall be entitled to receive compensation at a rate to be fixed by the President but not in excess of the maximum rate of pay for grade GS-18, as provided in the General Schedule under section 5332 of title V of the United States Code.

"(d) Five members of the Committee shall constitute a quorum, and official actions of the Committee shall be taken only on the affirmative vote of at least five members. A special panel composed of one or more members upon order of the Committee shall conduct any hearing authorized by this section and submit the transcript of such hearing to the entire Committee for its action thereon.

"(e) The Committee is authorized to make such rules as are necessary for the orderly transaction of its business.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Leave to File Amicus Brief together with copies of the Brief for Amici, Allegheny Power System, Inc., et al., have been served upon Angus Macbeth, Esquire, Natural Resources Defense Council, Inc., 15 West 44th Street, New York, New York 10036, Attorney for Petitioner; upon Raymond W. Mushal, Esquire, Department of Justice, Pollution Control Section, Room 2631, 10th and Pennsylvania Avenue, N.W., Washington, D. C. 20530, Attorney for Respondent; and upon Charles F. Lettow, Esquire, Cleary, Gottleib, Steen & Hamilton, 1250 Connecticut Avenue, N.W., Washington, D. C. 20036, Attorney for Intervenors, by United States Mail, properly addressed and postage prepaid, on this 30th day of August, 1974.

Turner T. Smith, Jr.